Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

RANDALL W. HANSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the "Responsible Corporate Officer" Doctrine Permits Felony Conviction of Individual Corporate Officers for "Failure to Detect" Violations Under Environmental Statutes for Which Congress Required Proof of Actual Knowledge.

II. Whether a "Responsible Corporate Officer" Jury Instruction May Permit Conviction for "Knowing Endangerment" Under 42 U.S.C. §§ 6928(e) and (f) Without the Statutorily Required Jury Finding that the Individual Corporate Officer was Actually Aware or Actually Believed that His Conduct was Substantially Certain to Place Others in Imminent Danger of Death or Serious Bodily Injury.

III. Whether Purely Intra-Corporate Discussions and Decision-Making can Satisfy the Plurality Requirement for Conviction of Individual Corporate Officers for Felony Conspiracy under 18 U.S.C. § 371.

PARTIES TO THE PROCEEDING

I. Petitioner

Randall W. Hansen

II. Respondents

United States of America
Christian A. Hansen (expected to petition separately)
Alfred R. Taylor (expected to petition separately)

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PETITION FOR A WRIT OF CERTIORARI

Randall W. Hansen hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-63a) is reported at 262 F.3d 1217.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2001. The court of appeals denied a timely petition for rehearing on October 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d)(2), (e), & (f), the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A), and the federal conspiracy statute, 18 U.S.C. § 371. Pertinent portions of these statutes are reproduced in Appendix D, 68a-74a.

STATEMENT OF THE CASE

Introduction. Criminal penalties are undeniably an important weapon in the government's environmental enforcement arsenal. With this case, however, the balance between the need for strong environmental enforcement and fundamental principles of criminal jurisprudence has tipped radically askew. In upholding the conviction and four-year prison sentence of Randall Hansen, who learned of the environmental violations at issue, in the district court's words, "after the fact," R14-235-6, the Eleventh Circuit has further complicated an already opaque morass of opinions variously attempting to define the point at which business decisions

become felonious criminal conduct under the "responsible corporate officer" doctrine.[1]

This case presents the Court with an opportunity to clarify the parameters of the doctrine of vicarious "responsible corporate officer" criminal liability as it has evolved since *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975). At the same time, it permits review of the related issue of intra-corporate conspiracy liability under 18 U.S.C. § 371, which, though tolerated by numerous lower courts, recent legal scholarship has called seriously into doubt.[2] No previous case, to petitioner's knowledge, has presented these broad issues so squarely,[3] nor has the misapplication of the relevant doctrines led to so profoundly unjust a result for an individual petitioner.

The troubling outcome in this case had its genesis in a jury instruction that permitted conviction of Mr. Hansen for serious felonies under the Resource Conservation and Recovery Act (RCRA) based on the fact of his corporate position and a

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[1] *See, e.g.*, Jason Blacksberg *et al.*, *Environmental Crimes*, 38 Am. Crim. L. Rev. 607, 617 (2001) (surveying circuit decisions: "[t]he degree to which the responsible corporate officer doctrine eliminates the *mens rea* requirement of various environmental statutes is not well settled.").

[2] *See generally* Shaun P. Martin, *Intracorporate Conspiracies*, 50 Stan. L. Rev. 399 (1998) (comprehensively and critically examining the federal judicial response to the doctrine of intracorporate conspiracy).

[3] *Cf. Hanousek v. United States*, 528 U.S. 1102 (2000) (denying certiorari on the question whether a misdemeanor conviction under the Clean Water Act's criminal *negligence* provisions violated the defendant's due process rights). Dissenting from the denial of certiorari, Justice Thomas, joined by Justice O'Connor, noted that "[w]hatever the merits of petitioner's underlying due process claim, . . . it is erroneous to rely, even in small part, on the notion that the CWA is a public welfare statute." *Id.* (Thomas, J., dissenting). The dissent noted that the circuits were split on this issue, arguing persuasively that the Court should "further delineate [the] limits" of the public welfare doctrine. *Id.*

"failure to detect" the violations at issue. The district court erroneously applied the mere "failure to detect" standard not only to RCRA's basic felony of treating, storing, or disposing of hazardous wastes without a permit (which itself requires proof of actual knowledge of the facts constituting the violation), but also to its "knowing endangerment" provision, which has enhanced scienter requirements and concomitantly enhanced penalties, including up to fifteen years in prison. This standard completely subverted Congress' explicit intent to punish as knowing endangerment only the most culpable, egregious, life-threatening conduct. By contrast, the district judge himself summarized Randall Hansen's supposedly culpable conduct as a "lack of action, *whether intentional or unintentional*." R14-235-8 (emphasis added).

Under the "responsible corporate officer" doctrine as applied here, any CEO would be criminally liable for all environmental violations, known or unknown, that occurred within the realm of his or her corporate employer. Compounding this legal error, the courts vastly overextended the criminal responsibility of corporate officers by simultaneously *rejecting* the precept of corporate unity in converting intra-corporate management discussions into a supposed "conspiracy" to continue operating the bankrupt company's Georgia plant. This created a truly slippery slope because the jury was in turn permitted to convict petitioner for substantive offenses committed by alleged "coconspirators" under *Pinkerton v. United States*, 328 U.S. 640 (1946). The interrelated nature of these issues—"responsible corporate officer" and "intra-corporate conspiracy"—suggests the wisdom of simultaneous review, though either issue standing alone would warrant the Court's attention.

The Indictment. In 1998, a federal grand jury sitting in the Southern District of Georgia, Brunswick Division, returned a 42-count indictment against petitioner Randall Hansen, charging him with violations of the federal conspiracy statute, 18 U.S.C. § 371 (count 1); the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) (CWA) (counts 2-21); and RCRA, 42 U.S.C.

§§ 6928(d)(2)(A) and (e) (counts 22-34). App. 13a-14a.[4] The allegations in the indictment arose from the operation, primarily in 1993 through February 1, 1994, of a chlor-alkali plant in Brunswick, Georgia, owned by LCP Chemicals (LCP), a division of Hanlin Group, Inc. (Hanlin). R1-1-2. During this period, Randall Hansen served—from the company's headquarters in New Jersey—as its Executive Vice President and, beginning in April 1993, as its interim Chief Executive Officer (CEO). App. 2a; GX1-2c. Also indicted were petitioner's father, Christian Hansen, founder and former Chairman and CEO of LCP; Alfred Taylor, the Brunswick plant manager; and Brent Hanson, the plant's environmental manager.[5] R1-1-3; R16-95; App. 13a-14a. None of LCP's four corporate-level environmental officers was charged. R20-50-51.

The CWA counts (2-21) alleged that the defendants, on various occasions, "knowingly" discharged mercury and chlorine in excess of the amounts allowed by the plant's National Pollutant Discharge Elimination System (NPDES) permit. R1-27-31. The first eleven RCRA counts (22-33) alleged that the defendants "knowingly" treated, stored, and

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[4] Petitioner was not charged under counts 35-41, which alleged reporting violations under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b)(3) (CERCLA). R1-37-39. At the close of the evidence, the district court entered judgment of acquittal on count 42, which alleged the criminal "taking" of the wood stork under the Endangered Species Act, 16 U.S.C. §§ 1538(a)(1)(B), 1538(g) and 1540(b)(1) (ESA). App. 14a.

[5] Brent Hanson, no relation to Randall Hansen, pled guilty to count 41, a CERCLA offense not charged against petitioner, and count 42, the ESA offense dismissed at the close of the case. App. 14a. Former employees with operational responsibilities at the Brunswick plant entered into plea agreements and later testified for the government. App. 13a, n.14. In exchange for testimony, the government immunized other corporate-level officers, including James Mathis, former Chairman of the Environmental Committee of LCP's Board of Directors. R19-172-73; R19-133.

disposed of hazardous waste without a permit. R1-31-36.[6] Various factual nuances colored each RCRA count as to the specific manner and dates of the alleged illegal treatment, storage, or disposal. For example, counts 22 and 23 alleged that, from May 29 through November 14, 1993, and again from November 15, 1993, through February 1, 1994, the defendants "cause[d] the disposal of hazardous waste" (*e.g.*, mercury contaminated wastewater) by allowing it to seep through holes, cracks, and gaps in the plant's cell room floor, "thereby causing the identified hazardous wastes to flow into and on the land and into the groundwater beneath" the floor. R1-31-32.

The last RCRA count (34) charged Randall[7] with knowing endangerment, alleging that he "knowingly" treated, stored, and disposed of hazardous waste without a permit, while "knowing at that time that such unpermitted treatment, storage and disposal thereby placed Hanlin employees and other persons in imminent danger of death and serious bodily injury . . . ." R1-36-37. When, in 1980, Congress enacted RCRA's knowing endangerment provisions with substantially enhanced criminal penalties, it defined this crime narrowly and precisely, with a clear expectation that the statute would be invoked sparingly, in "the occasional case where the defendant's knowing conduct shows that his respect for human life is

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[6] RCRA provides a range of administrative, civil, and criminal penalties by which the government may enforce the Act's restrictions on the handling of hazardous wastes. 42 U.S.C. § 6928. Under Section 6928(d)(2)(A) RCRA provides for felony criminal penalties (up to five years in prison) against any person who "knowingly treats, stores, or disposes of any hazardous waste" without a permit. RCRA also proscribes a number of other acts, not charged in this case, with penalties ranging from two to five years of imprisonment. *See, e.g., id.* § 6928(d)(3) (for knowingly making false statements in connection with reporting obligations under RCRA).

[7] Given the number of similar surnames in this case, we informally refer to petitioner, as did the court of appeals, by his first name.

utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." H.R. Conf. Rep. No. 96-1444, at 38 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038.[8]

The case against Randall Hansen stands in stark contrast to virtually all prior RCRA and CWA prosecutions.[9] Here, there was no evidence or allegation that he personally dumped or discharged hazardous wastes into the environment, or that he ordered a corporate agent to do so. Similarly, the case involved no evidence that he failed to report violations to the government or mislabeled containers of waste materials to deceive inspectors (two recurrent fact patterns in environmental prosecutions) or caused such violations. Nor did he turn a blind eye: "Randall attempted to find additional funds [for plant repairs] by selling excess equipment and reducing the payroll but the funds remained limited." App. 6a. Instead, the case against Randall, as the

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[8] The Ninth Circuit recently affirmed a conviction for RCRA knowing endangerment where the defendant personally ordered his employees to clean out tanks containing cyanide residue, repeatedly refusing their requests for protective gear, and causing the near death of one. *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001).

[9] *See, e.g.*, *United States v. Eidson*, 108 F.3d 1336, 1340 (11th Cir.) (one defendant gave another "permission to have the driver dump the contents of the truck into the sewer"), *cert. denied*, 522 U.S. 899 (1997); *United States v. Greer*, 850 F.2d 1447, 1450-52 (11th Cir. 1988) (defendant directly ordered illegal dumping); *United States v. Laughlin*, 10 F.3d 961, 963 (2nd Cir. 1993) (defendant first "began to demand repeatedly that [agent] release the contents of the tanker car onto the ground," and then, when agent refused, personally "released the entire contents of the tanker car directly onto the ground"); *United States v. Weitzenhoff*, 35 F.3d 1275, 1282 (9th Cir. 1994) (defendants "instructed two employees at the plant to dispose of [sludge] on a regular basis by pumping it from the storage tanks . . . directly into the ocean"), *cert. denied*, 513 U.S. 1128 (1995); *United States v. Sellers*, 926 F.2d 410, 412 (5th Cir. 1991) (defendant personally dumped sixteen 55-gallon drums of paint waste onto creek embankment); *United States v. Hoflin*, 880 F.2d 1033, 1035 (9th Cir. 1989) (defendant "instructed an employee to haul the paint drums to the sewage treatment plant and bury them").

government argued both at trial and on appeal, arose from his alleged "complicity" in LCP's corporate decision to continue operating the Brunswick plant until February 1, 1994. The government essentially contends that, because the plant repeatedly reported environmental violations during the year prior to its closure, without adequate funds for repairs and maintenance at the plant to prevent the violations, Randall, as CEO, should have caused the company to shut down the plant sooner.

Count 1, for conspiracy, encapsulated the government's theory of the case against Randall, alleging, *inter alia*, that he and his codefendants, "[a]s part of the conspiracy, . . . continued to operate the Brunswick facility in such a manner as to continue the disposal of these hazardous wastes without expending adequate funds to maintain and repair the floors of the cell room buildings so as to prevent the disposal of such hazardous wastes into the environment." R1-11.

Randall Hansen's Brief Tenure at LCP. After graduating from Harvard Business School in 1985, Randall joined the Boston consulting firm of Bain & Company, but later, at his father's urging, left to devote his talents to Hanlin's business, which faced considerable financial problems. GX 1-2c. In 1991, before LCP hired Randall as Executive Vice President, Hanlin, the parent corporation, filed a voluntary bankruptcy petition under Chapter 11, with pre-petition obligations exceeding $100 million. App. 6a. The company remained in bankruptcy throughout the relevant period. At all relevant times, the bankruptcy code restricted management's ability to allocate the estate's assets, or assume new debts, for maintenance, repairs, and environmental compliance. *Id.*; 11 U.S.C. §§ 363(c)(1), 363(b)(1) & 364. Furthermore, the "ultimate decision-making for all major projects, capital and extraordinary expenditures," including whether to shut down or cease operations at any plant, "were subject to the approval of the Board [of Directors] and the bankruptcy creditor's committee and court." App. 6a; SRII-7.

LCP's parent had purchased the Brunswick plant in 1979 from Allied Chemical. App. 2a. During the relevant time period, Randall visited the Brunswick plant on only two occasions (App. 7a-8a.), working principally out of his office in New Jersey on the company's intractable financial problems. The court of appeals concluded that Randall's "primary focus was financial and, with the support of the bankruptcy creditor's committee and court, he sought to sell the company to a responsible party who could operate the business and have the financial resources to deal with the various environmental conditions." App. 9a. At the same time, LCP's outside environmental counsel—the law firm of Dechert, Price & Rhoads in Philadelphia—actively pursued negotiations with the United States Department of Justice (DOJ), the Environmental Protection Agency (EPA), and the Georgia Environmental Protection Division (EPD) regarding LCP's acknowledged compliance problems. App. 6a; GX 10-7j & 10-7L; SRII-4. One 1992 report advised Randall and others, including at least one Board member:

> On August 19th, [1992,] a letter from [DOJ] was sent to both our environmental and bankruptcy attorneys. The DOJ now seems to understand that Hanlin Group does not have the financial resources to pay for all the fines assessed, consent order and permit obligations forced upon it by regulatory authorities. They are requesting that Hanlin develop an action plan and present it to the DOJ, et al for review, comment and implementation. Data is now being gathered and a strategy will be developed.

GX10-7j. Management at the Brunswick plant regularly reported the NPDES permit exceedences to the Georgia EPD in monthly correspondence from January 1993 until the plant closed on February 1, 1994. GX13-2v-2jj.[10] In April 1993,

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[10] Despite the ongoing reporting to, and negotiations with, federal and state authorities, EPA never exercised its statutory authority under RCRA

Randall sought to resign, but was persuaded to stay on by the Board and creditors committee who urged him to remain to complete the sale of the business. R21-200-201.

Despite numerous permit violations for the year to date, on October 30, 1992, the Georgia EPD renewed the plant's multi-year permit; but then in the summer of 1993 initiated proceedings to revoke the renewed permit for noncompliance. GX 13-1b; App. 10a. LCP filed an appeal, staying the revocation. App. 12a. The EPD ultimately also sought a TRO in state court to order the plant closed. *Id.* By then, however, a deal was reached to sell the plant back to its former owner, Allied Signal, and another investor, Holtrachem, which agreement obligated the purchasers to make a multimillion-dollar advance investment in improvements at the Brunswick plant; the buyers immediately began to advance the funds, *prior to* the deal's closing, "to the Brunswick plant for purchase of critical parts and equipment to improve operating reliability and environmental compliance." SRII-2(B). *See also* GX 10-6; App. 12a.

With that context, the creditor's committee pressured everyone concerned to keep the plant open and allow the Allied deal to close, specifically warning of the environmental hazards inherent in any plant closure, particularly where funds were limited. On November 30, 1993, the creditor's committee wrote to the state judge in the proceedings initiated by the Georgia EPD to warn her of the "likely consequences that would result from any closing of the Brunswick plant," which would require expenditure of "considerable amounts of money . . . to avoid the poss-

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to seek an injunction of continued operation of the Brunswick plant because it presented an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(a) (1994 ed.). Nor did the Occupational Safety and Health Administration, after inspecting the plant in 1992, take any action beyond levying minor fines and requiring corrective action, which LCP promptly implemented. App. 5a; GX 10-7i.

ibility of an environmental catastrophe." App. 12a, n. 12. Government witnesses admitted at trial that shutting off a chlor-alkali plant's power without properly decommissioning it would cause "the [mercury] cells [to] cool off, the joints [to] open up, and you would get additional mercury leakage"; that "you can't just turn off the switch and leave and not expect some dramatic consequences"; that one "would expect to see additional settling and cracking [in the cell room floors] and buildup of fluids [on the floors] after a plant shut down"; and that one generally "would expect the conditions at the plant to possibly worsen after the shutdown." R20-147; R19-73, 76, 83-84. On December 1, 1993, the Board "concluded that it should not shut down the plant until further information developed because of the fact that a plant shut down may exacerbate other environmental problems and may prevent the acquisition by Allied and Holtrachem which [were] currently funding the plant upgrade and site remediation." SRII-1.

On December 6, 1993, the state judge, counsel for EPD, and representatives of LCP, Allied, and Holtrachem personally inspected the plant. GX13-4; SRII-5; R20-302-03. Back in court later that day, counsel for EPD complimented LCP's "extraordinary efforts" to improve the facility, and withdrew the TRO request to close the plant. SRII-5. In the end, however, "the purchase agreement [with Allied] . . . fell through and shortly thereafter the facility closed. After the plant closed, Randall . . . requested $1,500,000 in additional funds from the bankruptcy court to deal with the environmental impact of closing but the request was denied." App. 12a.

The government's principal witness at trial testified that Randall was "just as concerned as we [plant workers] were" about conditions in the plant. App. 8a. Moreover, "[the plant manager] stressed safety and strict adherence with LCP's training and safety programs, and assured employees the right to refuse to perform any activity if the employee felt it to be

unsafe." *Id.* In terms of actual injuries from plant conditions, the government proffered testimony from one former plant employee who once fell into a sump containing caustic wastewater; he admitted that he showered off, returned to work, and did not even report the incident to the plant nurse. App. 5a, n.6; App. 29a; R19-231. Nor did he even recall the decade in which the incident occurred. *Id.*[11]

The Verdict and Sentencing of Randall Hansen. The jury nonetheless returned a guilty verdict against petitioner on counts 1-34—including knowing endangerment, which trebled the base offense level under the Federal Sentencing Guidelines. On June 2, 1999, the Honorable Anthony A. Alaimo, Senior United States District Judge for the Southern District of Georgia, who presided over the trial, began the defendants' sentencing hearing by calling it "one of the most difficult days I have experienced since being on the bench for well-nigh thirty years." R22-229-2. The district court then sentenced Taylor to serve 78 months of incarceration, and petitioner's father to serve 108 months of incarceration and to pay a $20,000 fine. App. 14a. The court also began con-

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[11] As evidence of hazards at the plant, the Eleventh Circuit's opinion refers to this incident as well as a NIOSH study of mercury levels in employees, prepared in 1987 and 1988, years before Randall was hired as CEO of LCP. App. 20a-22a. At trial there was no hint even that Randall had ever heard of the incident or the report. The court's implicit suggestion that a CEO is aware of findings and conclusions in every document in the company's files is the very essence of constructive knowledge. Indeed, on cross-examination of Randall, the government actively and prejudicially sought to establish such constructive knowledge by questioning him on the contents of a company document dated 1981, when he was an undergraduate at Vanderbilt University. R21-203-04 (prosecutor: "you heard the evidence [during trial] about *the corporate knowledge that your company had* about the existence of this glob underneath the cellroom back in 1981 ..."); R21-205 (prosecutor, referencing 1987 document: "Doesn't that indicate that, *institutionally,* LCP was well aware of what was happening under cell building #1?") (emphasis added).

sideration of petitioner's sentencing, noting the outpouring of glowing supportive letters from his friends and associates, including Hugh Croom—the Brunswick plant manager and government's first witness at trial. R28-248-75. The court then abruptly deferred ruling on Randall's sentence, stating "if I knew of an appropriate way to really depart, I would do so." R28-248-78.

On July 1, 1999, at the reconvened sentencing hearing, the court summarized the evidence against Randall by observing that Randall "was never directly involved in the discharging or dumping of hazardous waste, nor did he order such conduct to take place." R14-235-12. The court found that Randall's responsibilities within LCP gave him "knowledge [that] concerned itself more with the financial aspects of the corporation and not the day-to-day operations of the various chlor-alkali plants opened by the Hanlin Group." R14-235-5. The court further found that LCP's "willful violation[s] of the EPD permits were done without [Randall's] prior consent or knowledge." R14-235-13. The court then characterized the case against Randall as essentially one of negligence, finding that he "failed to act in an appropriate and reasonable manner when various violations were reported to him," but that "he was notified of these violations after the fact. And his failure to act in a reasonable manner caused further harm to the environment." R14-235-6. As for the alleged knowing endangerment of plant employees, the court stated: "Mr. Randall Hansen's lack of action, *whether intentional or unintentional*, seriously placed the workers at LCP and this community in danger." R14-235-8 (emphasis added).[12]

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[12] Not only is negligence an insufficient basis for conviction of these crimes, Congress specifically considered and rejected a House proposal based on the concept of "reckless endangerment" during the conference on RCRA's knowing endangerment provisions. *See* H.R. Conf. Rep. No. 96-1444, at 37 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5037.

After making reductions to the offense levels but denying Randall's request for a downward departure under Chapter 5 of the Federal Sentencing Guidelines, the court then sentenced Randall to serve 46 months of incarceration and to pay a $20,000 fine. App. 14a, 59a; R14-235-12-13.

The District Court's Instructions to the Jury. The instructions in this case explain how the jury could have found Randall guilty on this record. After initially instructing the jury on the elements of the substantive CWA and RCRA offenses, eight transcript pages later the court read a "responsible corporate officer" instruction—to which trial counsel for petitioner and his codefendants made several objections—which articulated an alternative basis for conviction and effectively dispensed with the statutory *mens rea* elements of 42 U.S.C. §§ 6928(d)(2)(A), (e), and (f)[13]:

> Now each Defendant under consideration may be found guilty of Counts 22 through 34 of the Indictment if you find that the Government has proven the following beyond a reasonable doubt:
>
> First, that the Defendant under consideration had a responsible relationship to the violation—that is, that it occurred under his area of authority and supervisory responsibility;
>
> Second, that the Defendant had the power or capacity to prevent the violation; and

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[13] The court gave the "responsible corporate officer" instruction by listing elements—just like elements of a substantive crime—of responsible corporate officer liability in the same numerical, sequential manner as is normally done ("First, . . . Second, . . . Third, . . ."), and as the court had done, when giving its conspiracy, CWA, and original RCRA instructions. *See, e.g.*, CWA (R22-189-90), and RCRA (R22-191-92). The plain meaning was that the jury need consider only the three listed responsible corporate officer "elements" in deciding whether to convict or acquit petitioner of counts 22-34 under RCRA. The written instructions are reproduced at Appendix E, 75a-98a; the transcript of the oral instructions appears at R22-171-209.

> Third, that the Defendant acted knowingly in failing to prevent, detect or correct the violation.

R22-200; App. 95a (hereinafter the "responsible corporate officer" instruction). The government had submitted this proposed jury instruction, titled "Intent—Responsible Individual Instruction (RCRA)," before trial, and cited *Dotterweich* and *Park* for support. R6-106-56; *see* Appendix F, App. 99a-100a.

Earlier in the charge, the court read to the jury the standard definition of "acted knowingly," which appears in the third element of the "responsible corporate officer" instruction:

> Now with respect to the remaining counts of the Indictment—that is, those other than the conspiracy count—the Government must prove that each Defendant under consideration acted knowingly. In that regard, a person acts knowingly if he acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness. . . .

R22-187-88; App. 85a. Read together with the "responsible corporate officer" instruction, this instruction thus permitted the jury to convict Randall of any RCRA offense (and likely the charged CWA offenses as well) based on a finding that he consciously went about performing his job in the ordinary course of business, but failed to detect the violations. This simply is not, has never been, and certainly should not be, the standard applicable to environmental felonies requiring actual knowledge.

Proceedings in the Court of Appeals. On appeal, petitioner challenged his conviction based, *inter alia*, on the sufficiency of the trial evidence to support his conviction on all counts (1-34), and the error in the district court's "responsible corporate officer" instruction. Petitioner argued that the district court had extended the *Dotterweich* and *Park* "public welfare" concept to felony offenses under RCRA without requiring proof of their statutory *mens rea* elements. On August 31, 2000, approximately two weeks before the

scheduled oral argument, the panel requested that the government make a supplemental filing that, "with respect to *each* of the Appellants," set forth record citations to the evidence for each material element of each separate offense. At oral argument, the panel ordered the government to clarify and resubmit the requested supplemental filing consistent with its initial instructions.

On August 24, 2001, in a 74-page *per curiam* opinion, the panel affirmed the convictions of Christian Hansen, Taylor, and petitioner in all respects. In a highly disjointed discussion of the various challenges to the jury instructions, the panel devoted just two sentences to the district court's instruction that the jury could convict petitioner of knowing endangerment on a "responsible corporate officer" theory:

> As to Count 34, RCRA's knowing endangerment provision also requires proof that the hazardous waste violation placed persons in "imminent danger of death or serious bodily injury" and that the defendant had knowledge of that danger. 42 U.S.C. § 6928(e). Because the instructions clearly set forth that a finding of "acted knowingly" was required for a conviction, there was no error in the instruction.

App. 53a-54a. The second sentence, a confounding non sequitur to the first, now stands as the law of the Eleventh Circuit, in one of the first published appellate decisions to interpret the definition of knowing endangerment under RCRA.

The panel also affirmed petitioner's conviction for an exclusively intra-corporate "conspiracy" under 18 U.S.C. § 371:

> The evidence showed that the defendants admitting [sic] to sharing the common goal to operate the plant until a buyer could be found. The jury could infer from this goal and the defendants' knowledge of the plant's continuing problems with worker safety and environmental compliance that they reached a tacit agreement to operate the plant in violation of the environmental laws.

App. 43a.

The court of appeals granted petitioner's motion for a stay of the issuance of the mandate pending this Petition, implicitly concluding it would present "a substantial question." Fed. R. App. P. 41(d)(2)(A); Appendix C, App. 66a-67a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit has upheld a shocking and unprecedented extension of the "responsible corporate officer" doctrine, first articulated by this Court in *Dotterweich* and *Park* for strict liability misdemeanor offenses, to the most serious felony environmental crimes. The decision further eroded the required standards for criminal liability of individual corporate officers by sustaining an intra-corporate "conspiracy" theory, predicated solely on standard business discussions among corporate executives dealing with a bankruptcy situation. The resulting standard is fraught with legal and policy implications; it not only will permit conviction of innocent individuals, but ultimately will deter participation in responsible corporate behavior essential to environmental compliance.

The importance of this case is manifest, presenting as it does questions concerning "a fundamental purpose of criminal justice, sorting out the innocent from the guilty before imposing punishment."[14] The court of appeals' decision runs seriously afoul of this Court's decisions relevant to the interpretation of federal criminal statutes, as well as the prohibition against judicial crime creation implicit in the Constitution's separation of powers, by expanding the statutory definitions of multiple crimes. The decision also creates a direct conflict within the courts of appeals as to the

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[14] *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1994) (Kleinfeld, J., dissenting from denial of rehearing *en banc*) ("Dilution of the traditional requirement of a criminal state of mind, and application of the criminal law to innocent conduct, reduces the moral authority of our system of criminal law."), *cert. denied*, 513 U.S. 1128 (1995).

proper application of the "responsible corporate officer" doctrine to environmental crimes.

I. THE CULPABILITY STANDARDS FOR ENVIRONMENTAL CRIMES SHOULD BE CLARIFIED

In *Dotterweich* and *Park*, this Court adopted the "responsible corporate officer" doctrine for a very limited category of strict liability, misdemeanor, "public welfare" statutes, under which criminal liability may be imposed "upon a person otherwise innocent but standing in responsible relation to a public danger." *Dotterweich*, 320 U.S. at 281. The statute interpreted in *Dotterweich* and *Park*—the Federal Food, Drug, and Cosmetic Act—itself "dispense[d] with the conventional requirement for criminal conduct—awareness of some wrongdoing." *Id.* The Court, however, has long resisted arguments to "expand the doctrine of crimes without intent" beyond minor public welfare offenses, *Morissette v. United States*, 342 U.S. 246, 260 (1952), and nothing in *Dotterweich* or *Park* would support expanding the doctrine to crimes for which Congress supplied heightened culpability requirements and lengthy prison sentences.

A. The Eleventh Circuit Upheld a Diminished *Mens Rea* Requirement for Corporate Officers.

The "responsible corporate officer" instruction eliminated the statutory *mens rea* not only for knowing endangerment (count 34), but also for the eleven lesser RCRA offenses (counts 22-33). A person violates RCRA if he "knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter" without a permit. 42 U.S.C. § 6928(d)(2)(A). This Court has held that the use of the word "knowingly" in a federal criminal statute requires "proof of knowledge of the facts that constitute the offense." *Bryan v. United States*, 524 U.S. 184, 193 (1998). *Cf. Staples v. United States*, 511 U.S. 600, 619 (1994) (interpreting implied statutory

knowledge element to require proof "that petitioner knew of the features of his AR-15 [gun] that brought it within the scope of the Act"); *Morissette*, 342 U.S. at 271 (interpreting implied statutory knowledge element to require proof that defendant "had knowledge of the facts . . . that made the taking a conversion"). Knowledge of such facts, if acquired after the fact, cannot suffice because of the required "concurrence of an evil-meaning mind with an evil-doing hand." *Id.* at 251. Thus, Section 6928(d)(2)(A) required proof that petitioner had knowledge of—and caused—the specific treatments, storage, and disposals of hazardous waste charged in counts 22-33, when each violation allegedly occurred.

The "responsible corporate officer" instruction required no knowledge of any particular facts constituting these offenses; it permitted the jury to convict only if petitioner "acted knowingly in failing to . . . *detect or correct* the violation." R22-200 (emphasis added). The concept of failure to *correct* a violation that, tautologically, had already occurred, allowed conviction even if the jury found that petitioner first acquired knowledge of the violation after its occurrence, as the district court concluded he did.[15] The concept also eliminated the *actus reus* of the offense, which required proof that he *caused* the violation, not that he failed to take corrective steps after it happened. Similarly, the concept of failure to *detect* a violation explicitly authorized conviction absent any knowledge at any point in time. Indeed, the concepts of "failure to detect" and actual knowledge would logically seem mutually exclusive.[16]

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[15] *E.g.*, R14-235-6 (Randall "was notified of these violations after the fact"); R14-235-13 (violations of the environmental permits "were done without [Randall's] prior consent or knowledge").

[16] To "knowingly fail to detect" a fact—whatever this means—is far removed from the concept of "willful blindness," which occurs when a person acts purposefully to shield himself from the truth. *See* Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* § 3.5(b) (2d ed. 1986).

While the district court supplied an ersatz *mens rea* in the instruction (*i.e.*, "acted knowingly"), it elsewhere instructed the jury that, for each substantive count, the phrase "acted knowingly" meant only that a person "act[ed] intentionally and voluntarily, *realizing what he [was] doing*, and not because of ignorance, mistake, accident, or carelessness." R22-188 (emphasis added). For a person simply to "realiz[e] what he is doing" (*i.e.*, to be generally aware of the nature of his conduct) falls far short of an actual awareness of the circumstances and results of his conduct. Thus, the "responsible corporate officer" instruction replaced the statutory *mens rea* for all of the RCRA offenses with one that meant little more than "not sleepwalking."[17] Indeed, the government in its closing argument erroneously analogized the *mens rea* applicable to the charged CWA and RCRA offenses to the classic strict liability offense of speeding.[18]

Furthermore, "to ensure that the purpose to avoid learning the truth is culpable," *id.*, the Model Penal Code's formulation of willful blindness requires an "aware[ness] of a high probability of [the] existence" of the fact. American Law Institute, Model Penal Code § 2.02(7) (Proposed Official Draft 1962) (hereinafter "Model Penal Code").

[17] Due to the confusing manner in which the court instructed the jury, particularly the court's comment "wherever I have used the term 'corporate officers,' I mean responsible corporate officers," (R22-209), which the court made in passing literally moments before sending the jurors into the jury room to begin deliberations, the jury likely applied the instruction to all CWA as well as all RCRA counts.

[18] The government told the jury that the "knowing" requirement for the CWA and RCRA offenses was

> probably comparable to if we're driving 60 in a 30 zone and we have taken our eyes off of the speedometer and we're caught. We have done it knowingly. We're not doing it by some happenstance, thinking that we are in another situation. *We were driving.*

R21-160 (emphasis added).

B. The Error Was More Dramatic With Respect to the Knowing Endangerment Offense.

The starkest error in this case was in the "responsible corporate officer" instruction's application to knowing endangerment under RCRA. By statute, knowing endangerment occurs only if "a person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste," in violation of 42 U.S.C. § 6928(d), also "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." 42 U.S.C. § 6928(e). To assure proper implementation of Section 6928(e), Congress took the rare step of codifying a version of the Model Penal Code's definition of knowledge solely for RCRA's knowing endangerment statute. *Compare* 42 U.S.C. § 6928(f)(1), *with* Model Penal Code § 2.02(2)(b).[19]

Congress also added clarifying provisions that expressly require proof of the defendant's actual knowledge "that his conduct placed another person in imminent danger of death or serious bodily injury," *see* 42 U.S.C. § 6928(f)(2)(A) (providing that a person can be held "responsible only for actual awareness or actual belief that he possessed"), *and* that expressly prohibit constructive knowledge as a predicate for liability. *Id.* at § 6928(f)(2)(B) (forbidding attribution to the defendant of "knowledge possessed by a person other than the defendant but not the defendant himself"). Congress deemed

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[19] The House Conference Report on the Solid Waste Disposal Act Amendments of 1980 states that the "basic definition" of "knowing" that now appears at 42 U.S.C. § 6928(f)(1) was "derived from the general definition of this mental element proposed in the Criminal Code Reform Act, S. 1722." H.R. Conf. Rep. No. 96-1444, at 39 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5038; S. 1722, 96th Cong., 1st Sess., § 302 (1979); Kenneth R. Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 Am. Crim. L. Rev. 123, 129 (1980) ("S. 1722 replaces the confusing and inconsistent ad hoc approach to culpability that now characterizes federal criminal law with a new system that has its genesis in the Model Penal Code").

these provisions necessary to hone the jury's understanding of the *mens rea* required for conviction, and to protect corporate managers and officers from overreaching federal prosecutions:

> [T]he ultimate issue for the jury will be whether the defendant . . . was actually aware or actually believed that his conduct would create a danger described in subsection (e). . . . The conferees believe that these clarifying provisions are appropriate to accompany the creation of this new federal crime and are appropriate to protect persons engaged in complex decision-making from unjust indictment or conviction. . . . [R]esponsibility for the felony of criminal endangerment should properly be confined only to those persons who themselves have actual knowledge of the danger resulting from their conduct. *A supervisor, for example, who personally lacks the necessary knowledge, should not be criminally prosecuted for knowledge that only his subordinates possessed.*

H.R. Conf. Rep. No. 96-1444, at 39-40 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5039 (emphasis added).

Reflecting the Model Penal Code's definition of knowledge, Section 6928(f)(1) creates separate culpability requirements for each objective element (*i.e.*, conduct, attendant circumstances, and results) of the crime of knowing endangerment. *See* 42 U.S.C. § 6928(f)(1)(A)-(C).[20] Thus, with respect to a person's conduct, his state of mind is "knowing" if "he is aware of the nature of his conduct," *id.* § 6928(f)(1)(A); with respect to an existing circumstance, his state of mind is "knowing" if "he is aware or believes that the circumstance exists," *id.* § 6928(f)(1)(B); and with respect to the results of his conduct, his state of mind is "knowing" if

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[20] *See generally* Paul H. Robinson and Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 692-99 (1983) (knowledge under the Model Penal Code "is defined in relation to each objective element of the offense—i.e., conduct, attendant circumstances, or result").

"he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury." *Id.* § 6928(f)(1)(C).

The district court's "responsible corporate officer" instruction failed to require proof that petitioner had actual knowledge—*i.e.*, actual awareness or actual belief—of any existing circumstances or expected results of his conduct, as defined under Sections 6928(f)(1)(B)-(C) and clarified under Sections 6928(f)(2)(A)-(B). The instruction thus eviscerated the statutory *mens rea*. It permitted the jury to convict petitioner of knowing endangerment based only on a finding, at most, that he had a general awareness of the nature of his conduct within the meaning of Section 6928(f)(1)(A), ignoring entirely the additional required elements.

In its *per curiam* opinion the court of appeals never addressed the significant differences in these culpability requirements, cursorily upholding the instruction because it included the phrase "acted knowingly." Other courts, however, have recognized the distinction, particularly in state jurisdictions that have adopted versions of the Model Penal Code's culpability provisions. The Montana Supreme Court's decision in *State v. Lambert*, 929 P.2d 846 (Mont. 1996), which reversed a conviction for criminal endangerment under Montana law, is particularly apropos. In *Lambert*, the court considered jury instructions that defined "knowing" to mean *either* awareness of conduct, awareness of circumstances, *or* awareness that there was a high probability that conduct would cause a specific result. *Id.* at 848. Interpreting Montana's criminal endangerment statute as "emphasiz[ing] result over conduct," the court found these alternative instructions to be erroneous:

> [A] person may engage in a wide variety of conduct and still commit the offense of criminal endangerment, provided that the conduct creates a substantial risk of death or serious bodily harm. . . . There being no

> particularized conduct which gives rise to criminal endangerment, applying to that offense's mental element the definition of "knowingly" that an accused need only be aware of his conduct is incorrect. It is the appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment; were it otherwise, where culpability could lie for mere appreciation of one's conduct, such as driving a car or shooting a hunting rifle, some very unfair results could follow.

Id. at 849. This reasoning applies with particular force to corporate officer liability in the environmental context.[21]

C. The Judicial Creation of New Crimes Violated Separation of Powers.

By approving the "responsible corporate officer" instruction, the court of appeals extended *Dotterweich* and *Park* to offenses charged under 42 U.S.C. §§ 6928(d)(2)(A) and (e) and dispensed with their explicit statutory *mens rea* requirements. Despite a clear command from Congress requiring a jury finding of actual knowledge for liability under RCRA, the district court's *mens rea* (to "act knowingly") ranged somewhere between strict liability and negligence, the standard of culpability ultimately created by *Dotterweich* and *Park*. *See Dotterweich*, 320 U.S. at 284 (permitting liability "though consciousness of wrongdoing be totally wanting"); *Park*, 421 U.S. at 679 (Stewart, J., dissenting) (characterizing the Court's opinion as employing "the language of negligence"). However, "[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything

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[21] *See also People v. Curtis*, 627 P.2d 734, 736-37 (Colo. 1981) (reversing conviction where "[t]he jury instruction on the culpability for extreme indifference murder was defective because it defined 'knowingly' with respect to conduct and circumstance, but not with respect to result.")

less than the incriminating components contemplated by the words used in the statute." *Morissette*, 342 U.S. at 263

The proceedings below thus magnify a separation-of-powers problem intrinsic to the "responsible corporate officer" doctrine. The power to define federal crimes belongs exclusively to Congress, *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812); *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76 (1820), thus implementing the principle of legality. *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997). Inherent in the judicial exercise of translating the statutory elements of a crime into a theory of liability specially tailored for corporate officers is a likelihood of frequent deviation from "the words used in the statute," *Morissette*, 342 U.S. at 263, and concomitant judicial crime creation. Even in *Dotterweich*, the doctrine's propensity for ad hoc judicial criminalization of corporate conduct influenced the dissent:

> [T]he fact that individual liability of corporate officers may be consistent with the policy and purpose of a public health and welfare measure does not authorize this Court to impose such liability where Congress has not clearly intended or actually done so. Congress alone has the power to define a crime and to specify the offenders. *United States v. Wiltberger*, 5 Wheat. 76, 95. It is not our function to supply any deficiencies in these respects, no matter how grave the consequences.

320 U.S. at 286-87 (Murphy, J., dissenting). The systemic risk of judicial crime creation resulting from the lower courts' haphazard attempts to adapt *Dotterweich* and *Park* to statutes with heightened, complicated culpability requirements, calls for clear guidance from this Court.

D. The Court of Appeals' Decision Conflicts with Decisions of the First, Fifth, and Ninth Circuits.

Absent a direct precedent from this Court, the lower courts have produced an unclear and fragmented body of case law concerning the application of the "responsible corporate

officer" and "public welfare" doctrines in environmental criminal cases. The *American Criminal Law Review* recently surveyed these decisions and concluded that "[t]he degree to which the responsible corporate officer doctrine eliminates the *mens rea* requirement of various environmental statutes is not well settled." Jason Blacksberg *et al.*, *Environmental Crimes*, 38 Am. Crim. L. Rev. 607, 617 (2001).[22] The decision in this case promises only to exacerbate this doctrinal indeterminacy, on a question that has grown in importance in recent years as "the EPA and the DOJ increasingly have targeted individual corporate officers, as well as corporations, for criminal enforcement actions." *Id.* at 618.

To the extent that coherent principles had begun to form, the overarching theme emerging from these cases (at least prior to the decision below) was that a "responsible corporate officer" instruction could not require proof of anything less than the statutory actual knowledge standard required for conviction under RCRA and CWA. *See United States v. MacDonald & Watson Waste Oil Company*, 933 F.2d 35 (1st Cir. 1991); *United States v. Iverson*, 162 F.3d 1015, 1026 (9th Cir. 1998). In *MacDonald & Watson*, the lower court gave an instruction that permitted a RCRA conviction if the corporate officer knew that "illegal activity of the type alleged occurred." 933 F.2d at 51. The First Circuit reversed the conviction because the instruction permitted the government to establish guilt by "simply establish[ing] that the defendant was a responsible corporate officer," which—like the instruction in this case—required proof of only "three things, none of which, individually or collectively, neces-

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[22] *See also* Brenda S. Hustis and John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 Loy. U. Chi. L. J. 169, 184-85 (1994) (observing that "of those authorities that have advocated the extension of the RCO doctrine to [federal environmental] statutes, opinions are divided regarding the extent to which the RCO doctrine affects the statute's mens rea requirement.").

sarily established his actual knowledge of the illegal [transaction] charged." 933 F.2d at 53. Similarly, in *Iverson*, a CWA prosecution, the Ninth Circuit upheld a "responsible corporate officer" instruction, which included an explicit statement requiring proof that the defendant "had knowledge of the fact [of the violation charged]." 162 F.3d 1015, 1022. The court upheld the instruction only because "the government still had to prove . . . that the defendant knew that the discharges were pollutants." 162 F.3d 1015 at 1026.

The panel's opinion in this case also conflicts with the Fifth Circuit's opinion in *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996), *reh'g denied*, 108 F.3d 335 (5th Cir. 1997), insofar as the court in this case approved an instruction erroneously derived from *Dotterweich* and *Park*, which turn on the precept that "public welfare" statutes may properly be implemented with reduced *mens rea* standards to further their public policy objectives. In *Ahmad*, the Fifth Circuit held that the CWA was not a public welfare statute, reversing the conviction because the jury was not instructed that the *mens rea* requirement applied to each element of the offense. 101 F.3d 386 at 391 (citing *Staples*, 511 U.S. at 607). *But cf. United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (holding that CWA is a public welfare statute), *cert. denied*, 1513 U.S. 1128 (1995).

II. CRIMINAL LIABILITY FOR INTRA-CORPORATE "CONSPIRACIES" CONTRADICTS COURT PRECEDENT AND BASIC PRINCIPLES OF LAW

Since this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the doctrine of intra-corporate conspiracy has been inconsistently applied in the circuit courts. In the nearly two decades since *Copperweld*, courts have largely rejected civil intra-corporate conspiratorial liability while perfunctorily approving intra-

corporate liability in criminal conspiracy cases. *See generally* Shaun P. Martin, *Intracorporate Conspiracies*, 50 Stan. L. Rev. 399 (1998) (comprehensively and critically examining the federal judicial response to the doctrine of intracorporate conspiracy). The Eleventh Circuit has long held that intra-corporate conduct satisfies the plurality requirement for conviction under 18 U.S.C. § 371. *See United States v. Hartley*, 678 F.2d 961, 968 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

As noted by recent legal scholarship, however, the refusal to apply the *Copperweld* reasoning to 18 U.S.C § 371 is erroneous and inconsistent with this Court's precedent and basic principles of law. Martin, *supra.*, 445-446. Moreover, the policy considerations underlying *Copperweld* are profoundly implicated in the environmental context.

A. The Circuit Courts Treat Intra-corporate Conspiracies Inconsistently.

In *Copperweld,* the Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for the purposes of § 1 of the Sherman Act." *Copperweld*, 467 U.S. at 771. As a result, parent and subsidiary corporations were held to be legally incapable of conspiring with each other under Section 1. *Id.* at 777. This reasoning has been applied in federal civil conspiracy cases under statutes with language substantially similar to 18 U.S.C. § 371, such as 42 U.S.C. §§ 1985(2) and (3), both civil rights statutes requiring proof that "two or more persons . . . conspire . . . ." *See, e.g., Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839-40 (6th Cir. 1994) (citing *Copperweld* and applying the intra-corporate conspiracy doctrine to find no conspiracy under Section 1985(3)); *Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108, 109-111 (7th Cir. 1990) (same analysis in Section 1985(2) context); *Buschi v. Kirven*, 775 F.2d 1240, 1251-53 (4th Cir. 1985) (citing *Copperweld* and dismissing actions alleging conspir-

acy in violation of civil rights); *Doherty v. American Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir. 1984) (finding no conspiracy under Section 1985(2) based on intra-corporate conspiracy doctrine). The circuit courts, however, have refused to apply the *Copperweld* approach in the criminal conspiracy context. *See, e.g., United States v. Ames Sintering Co.*, 927 F.2d 232, 236-37 (6th Cir. 1990) (upholding criminal intra-corporate conspiracy conviction by limiting *Copperweld* and its reasoning to the Sherman Act context despite its own and other circuits' application of *Copperweld* to non-antitrust civil conspiracy cases).

As this Court has noted, 18 U.S.C. § 371 "is the descendent of and bears a strong resemblance to conspiracy laws that have been in the federal statute books since 1867." *Tanner v. United States*, 483 U.S. 107, 128 (1987). However, "[n]either the original 1867 provision nor its subsequent reincarnations were accompanied by any particularly illuminating legislative history." *Id.* This Court has previously examined nineteenth-century common law to discern the legislative intent behind the federal criminal conspiracy statute. *See United States v. Dege*, 364 U.S. 51 (1960) (examining whether common law fiction of marital unity operated to prevent plurality for purposes of 18 U.S.C. § 371). In *Dege*, the Court presumed that Congress incorporated then-existing common law principles into the federal conspiracy statute, *see id.* at 54, consistent with well-settled principles of statutory interpretation. *See Morissette*, 342 U.S. at 263 (stating that when Congress codifies a preexisting legal concept the judiciary must assume, in the absence of contrary legislative instruction, that Congress meant to adopt the accumulated legal tradition and "cluster of ideas" attached to the concept).

At the time of the "Act of 1867," referenced by the Court in *Tanner* as the basis for the current federal conspiracy law at issue, wholly intra-corporate conduct failed to meet the

plurality requirement of conspiracy law.[23] The Seventh Circuit examined the history surrounding the enactment of the Civil Rights Act of 1871 with regard to intra-corporate conspiracy in *Travis*, 921 F.2d at 110. The court found that "[w]hen Congress drafted § 1985 [*i.e.*, the Civil Rights Act of 1871] it was understood that corporate employees acting to pursue the business of the firm could not be treated as conspirators." *Id.* The proposition that "the corporation and its managers are 'considered as one person in law'" is a long-standing principle and remains the prevailing common wisdom. *Id.* (quoting William Blackstone, 1 *Commentaries on the Laws of England* *456 (1st Ed. 1765) and citing 10 Fletcher *Cyclopedia of the Law of Private Corporations* § 4884 (Lenore M. Zajdel ed. 1986)). Similarly, when Congress passed the federal criminal conspiracy statute in 1867—just four years before the Civil Rights Act of 1871—intra-corporate conduct could not constitute a criminal conspiracy. *See* Martin, *supra* at 447-50. There is no indication in 18 U.S.C. § 371 that Congress intended to diverge from that long-held common law principle of corporate unity.

B. The Court Should Interpret Any Ambiguity in 18 U.S.C. § 371 in Favor of Lenity.

This Court has long held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971) (citing *Bell v. United States*, 349 U.S. 81, 83 (1955)). Because neither the statutory text, legislative history, nor common law principles support the notion that intra-corporate conduct satisfies the plurality requirement for a criminal conspiracy under 18 U.S.C. § 371, the Court should read the statute in favor of lenity to exclude liability for intra-corporate conduct.

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[23] Professor Martin's article comprehensively lays out this historical analysis. Martin, *supra*, at 447-50.

C. Public Policy Concerns Also Militate against Criminalizing Intra-corporate Communications Regarding Environmental Compliance.

In *Copperweld*, the Court expressed concern that coordination of a corporation's internal efforts was essential to effective competition—the public policy advanced by the antitrust laws—and that intra-corporate conspiratorial liability would stifle such coordinated competitive effort. *Copperweld*, 467 U.S. at 769. Similarly, if corporate officers believed that they could go to prison for discussing environmental compliance issues as they arise, the free exchange of information among dispersed corporate agents essential to achieve compliance with the environmental laws will be stifled. *Cf. Travis*, 921 F.2d at 111. The logic of *Copperweld* thus supports a policy-based reason for precluding liability for intra-corporate "conspiracies" in matters charging environmental crimes. Combined with the "responsible corporate officer" doctrine, the government's prosecution of an intra-corporate "conspiracy" has led to an expansive theory of vicarious individual liability, which will no doubt propagate unintended, inequitable, counterproductive results that defy fundamental notions of due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 24, 2002

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 24, 2001]

No. 99-11638

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHRISTIAN A. HANSEN, ALFRED R. TAYLOR, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 98-00023-CR-2-1

Before BIRCH and DUBINA, *Circuit Judges*, and HANCOCK*, *District Judge.*

PER CURIAM:

Alfred R. Taylor, Christian A. Hansen, and Randall W. Hansen appeal their convictions for conspiracy to commit environmental crimes, violating the Clean Water Act, violating the Resource Conservation and Recovery Act, and violating the Comprehensive Environmental Response, Compensation, and Liability Act. On appeal, they each assert several alleged trial and sentencing errors. Finding no merit to their claims, we AFFIRM.

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

I. BACKGROUND

Christian Hansen ("Hansen") founded the Hanlin Group ("Hanlin") in 1972, and served as its President, Chief Executive Officer, and Chairman of the Board until early April 1993. R19-160. Hanlin operated an industrial plant in Brunswick, Georgia, as LCP Chemicals-Georgia ("LCP"), R21-41, and Hansen served as the plant manager for approximately two months in 1993. R19-166-67. Randall Hansen ("Randall"), Hansen's son, was hired as an executive vice president in 1992. R21-193. He became Chief Executive Officer in April 1993 and served in that capacity until November 1993. R21-195. Alfred Taylor ("Taylor") began working for LCP in 1979, and became the Brunswick operations manager in 1991. R21-243-44. He served as plant manager from February until July 1993. R21-244-45.

Hanlin purchased the Brunswick plant in 1979.[1] R21-41. The plant, which is on a site adjacent to tidal marshes and Purvis Creek, operated continuously year-round, manufacturing caustic soda, hydrogen gas, hydrochloric acid, and chlor-alkali bleach. About 150 people worked at the plant in two "cell buildings" or "cellrooms." Each cellroom was about the size of a football field and contained fifty mercury "cells," the units used to produce the bleach, soda, gas, and acid ultimately sold by LCP. R8-200-2. "The production process generated hazardous wastes, including elemental mercury,

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[1] The site has been used by various companies for 50 years, and was unregulated by any environmental regulations until the 1970s. The site was operated as an oil refinery from 1919 to 1937 by Atlantic Richfield [ARCO], as a manufacturing site from 1937 to 1955 by Dixie Paint Company, and as a chlor-alkali facility from 1955 to 1979 by Allied Chemical. R16-85-86. Allied Chemical used graphite anodes impregnated with PCBs during the chlor-alkali process, and buried the contaminated anodes on the site. R21-54, 229. It is now a Superfund site, and is being cleaned at the expense of the government and these earlier owners.

mercury-contaminated sludge (or "muds"),[2] wastewater, chlorine contaminated wastewater, and extremely caustic wastes with high pH values." *Id.* at 2-3; R16-112-14. The wastes were subject to various environmental regulations, including wastewater limitations on pH, mercury, and chlorine set forth in LCP's National Pollutant Discharge Elimination System ("NPDES"), and to regulations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(d)(2).

LCP constructed a wastewater treatment system in 1989 and 1990, and was allowed, by NPDES permit, to discharge the treated wastewater into Purvis Creek. Although LCP represented that the system would have a continuous treatment capacity of 70 gallons per minute in the project description submitted to the Georgia EPD, Govt. Ex. 10-3b at SW5 00001807, the filtration and storage systems installed had a capacity of only 35 gallons per minute, R20-20-21; Govt. Ex. 1-12. LCP did not notify the Georgia EPD of the

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[2] In a memorandum regarding mercury consumption, dated 4 October 1993, Taylor noted that mercury "[c]onsumption was particularly high in 1988" and for 1990-1993. Govt. Ex. 19-5. An attachment showed "excess" mercury from consumption of 243,102 pounds from 1986 to 1993. *Id.*

The "mud" was spread onto the cellroom floors to dry, the mercury was recovered from underneath and on top of the mud, and the mud was put into drums for disposal. R19-190-93. When the wastewater covered the floors, the mud could not be stored until the water receded and it was dried. *Id.* at 191. The drums were stored underneath the cellrooms. R20-62. The drums were labeled and dated when the mud was first put into the drum "because [the plant] only had a ninety-day storage period under [the] permit." *Id.* at 62-63. There were "times" when the mud was "redrumed" and again labeled for another ninety-days. *Id.* Hanson testified that Taylor was aware of the muds in the drums. *Id.* at 62.

At Taylor's direction, mud that accumulated in the wastewater stored in tank railcars was "drained off to the wastewater treatment area." R20-356-57.

lower wastewater treatment capacity. R20-290. The plant was authorized to store wastewater which was awaiting treatment in the wastewater treatment plant on the floor of the cellrooms. R16-118; R21-145, 161. The cellrooms were constructed of concrete, with a downward slope which diverted the wastewaters to a sump[3] and then to the wastewater treatment holding tanks. R19-33-34. If the cellroom became incapable of holding the wastewater, it leaked out onto the ground and accumulated in a lake. R16-131-32. LCP also used "Bunker C" oil tanks for additional wastewater storage. R19-291; R20-42-45. Due to accidental spills, bleach sometimes accumulated on the Cellroom 1 floor. R19-258. During the early 1990s, the maintenance at the plant began deteriorating. R20- 177, 179. Replacement parts were not made available, and wastewater began accumulating around the plant. *Id.*

The operations were subject to Occupational Safety and Health Administration ("OSHA") regulations for the protection and safety of the employees. The workers exposed to mercury vapors in the mercury cell process were provided with liquids to drink in order to stay hydrated and deplete the mercury, and their exposure was periodically monitored through an extensive mercury urinalysis procedure. R20-145-46; R21-251-52. Employees who showed exposure to excess mercury were not allowed to return to work until they were seen by a medical physician, and were then relocated to other plant locations away from the mercury cells.[4] R20-146, 164-65, 168-69, 174; R21-255, 258; R22-12, 24.

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[3] A sump is a hole with a grate over it. R19-34

[4] LCP retested and counseled any employee who tested above 150 micrograms per liter, and employees with a confirmed result above 250 micrograms were removed from further exposure until their level went below 150. R21-253-55.

In August 1992, OSHA inspected the plant "due to an employee complaint about safety hazards associated with water on cell room floors." Govt. Ex. l0-7i. OSHA found this to be a "willful violation and demanded that no employees be allowed to work in contact with the water while the equipment was energized," and "forced" LCP "to erect a boardwalk system above the water level around all the equipment until the water c[ould] be eliminated permanently." *Id.* LCP added wooden elevated walkways in the cellrooms to prevent the workers from having contact with the water on the floor and to reduce the workers' risk of electrical shock or chemical burns.[5] R16-118; R21-145-46, 161. The chemicals used in LCP's operations were very alkaline and caustic and could irritate and burn skin.[6] R16-93; R19-43, 197; R20-188; R21-263-64. To minimize the workers' risk of skin irritations and burns, LCP held routine safety meetings, encouraged and received safety inspections, and provided the employees with training, protective

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[5] The water occasionally rose high enough to splash onto or soak the walkways, and they became slick. R20-181, 322. OSHA also required that LCP utilize a lockout procedure for employees to work on a cell or pump because of the potential electrical hazards. R19-45; R20-190. In the lockout procedure, an operator ensured that the electrical power was shut off before a mechanic was permitted to begin work. R19-46-47; R20-190, 323.

[6] One former employee, Duane Lorenzo Carver, testified that he received second and third degree burns on his thighs from caustic that had soaked through his clothes. R19-182, 197. In reference to a question regarding the conditions of the cellrooms in 1993, he said that, while digging out the sump, he misstepped and fell into the sump hole, which was filled with wastewater, "about chest deep." R19-201-03, 227-228. Carver said that he showered immediately and suffered minor burns on his stomach and legs. R19-203, 229. Carver was unable to recall the exact date, and admitted the accident could have occurred any time between 1987 and 1993. R19-226. Carver testified that, although the employees were told to report all accidents to management, he did not report the accident, and thus did not receive any medical attention. R19-230.

equipment to preclude skin contact, and first aid stations and showers to relieve inadvertent contact. R19-47, 194, 233-34, 246, 300-01; R20-170, 181-82, 185, 188, 190-91; R21-249. All employees, including those assigned to the cellrooms, were authorized to work elsewhere in the plant if they were concerned about their safety. R19-302; R20-186-87, 320-2; R21-156.

In 1991, LCP' s parent corporation, Hanlin, filed a voluntary bankruptcy petition with pre-petition obligations exceeding $100 million. R19-119; R21-194. Shortly thereafter, Randall was hired as an executive vice president of LCP and charged with "developing the business and financial plans necessary to turn around the financial condition of the chemical business." [7] R21-193; R16-97. Randall worked closely with Hanlin's bankruptcy attorneys, the law firm of McCarter and English, and the environmental law firm of Decher, Price and Rhoads. R19-140-43; R21-194, 215.[8] Randall also worked closely with LCP's corporate environmental manager and site environmental managers. R20-64-65; R21-210, 215. During the bankruptcy proceedings, available funds for maintenance, repair, and environmental compliance were restricted. R19-50-52. Randall attempted to find additional funds by selling excess equipment and reducing the payroll but the funds remained limited. *Id.* The ultimate decision-making for all major projects, capital and extraordinary expenditures, and the sale of assets, were subject to the approval of the Board and the bankruptcy creditor's committee and court. R19-121, 143-47, 174-75; R21-196. Although funds were requested to address the cellrooms' wastewater problem, the funds were usualiy not released. R21-259-60.

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[7] Randall Hansen had worked for Hanlin in a financial capacity from 1986 until 1989.

[8] During the bankruptcy proceedings, Hanlin set aside seven to ten thousand dollars per day for professional fees. R19-147.

In February 1992, the Brunswick plant manager, James L. Johns, advised Randall in writing that, without "extensive work," to keep the wastewater treatment system operable, they would be unable to "operate the plan for more than a few days without 'willfully' violating EPD regulations which we will not do." Govt. Ex. 1-8a at HA 00024857.[9] In April 1992, Randall visited the Brunswick plant and met with plant manager James L. Johns for "an update on regulatory compliance requirements." Govt Ex. 10-7b. He indicated that he would provide guidance on the approval of funds for a study for the NPDES permit, LCP's commitment regarding the 1 June 1992 Georgia EPD deadline for cellroom floor repairs, and the possibility of a study or remediation plan for the "brine impoundments." *Id.* In June 1992, Randall was advised in writing that a conference with OSHA on 8 May 1992 noted 26 serious violations and 11 non-serious violations. Govt. Ex. 10-7d.

During the summer of 1992, the Brunswick plant management changed.[10] R16-104-05. In August 1992, Taylor advised Randall that Brunswick was "unable to meet current permit limitations," that he anticipated "more restrictive" limitations, and that the "[p]erformance of the

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[9] The memo was addressed "Production Reliability" and noted that "[l]ack of money has limited the plant production capability and imposed substantial risk on maintaining acceptable production levels." Govt. Ex. 1-8a at HA 00024856. The wastewater treatment issues were one of nine noted problems. *Id.*, HA 00024856 and 57.

[10] J.L. Johns, the plant manager at the beginning of 1992, retired due to heart problems. R16-104. During the six month search to replace Johns, Hugh Croom, the plant manager for the LCP chlor-alkali plant in North Carolina, transferred to Brunswick and acted as plant manager. *Id.* at 103-05. Croom returned to the North Carolina plant in January 1993, and admitted that problems with the wastewater treatment plant and his concerns for maintaining a production rate and for the safety of the employees and the community contributed to his desire to leave Brunswick. R16-134-36.

waste water treatment system [was] a serious threat to the continued operation of the plant." Govt. Ex. 1-12. Taylor said that while the "generation of waste water ha[d] greatly increased due to leaking brine tanks, [poor condition of the] brine pumps [and] . . . brine filters, heavy rainfall, the necessity to destroy bleach, and numerous operating problems," at the same time the capacity of the wastewater system was limited by the reduced capacity of the filtration and storage systems, was "further reduced" by the "[l]ack of maintenance," and the system was "frequently shut down due to mechanical problems and operator errors." *Id.* In November 1992, Randall visited the Brunswick plant to interview a candidate for plant manager, and spoke with the acting manager, Hugh Croom. R19-30. At that time, Croom advised Randall of problems with the caustic filters and the intentional dumping of caustic on the cellroom floors by some unknown employee. R19-30-31, 56-58. Croom testified that Randall "was just as concerned as we were about the problems" and authorized Croom to hire a task force.[11] R19-50, 58.

In February 1993, LCP offered the plant manager job to Taylor. R21-244. During his tenure as manager, Taylor stressed safety and strict adherence with LCP's training and safety programs, and assured employees the right to refuse to perform any activity if the employee felt it to be unsafe. R19-302-03. When the wastewater overran the cellroom berms and streamed outside the building, the overflow was reported to the EPD and to the LCP Board by letters signed by Taylor. R20-25-27. The amounts reported in the letters were consistent with the data that the plant had at that time. R20-27.

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[11] The dumping abated once the task force was hired and the valve area was monitored. R19-58.

During the spring of 1993, Taylor attended a company meeting with Randall and Croom in which they discussed the condition of the Brunswick plant and possible solutions. R19-18-19. Taylor and Croom recommended "either shutting the plant down or shutting it down long enough to salvage one cellroom and rebuild the second cellroom, and then starting back up with just one cellroom." R19-20, 22. Taylor worked up "the figures and costs" and submitted it to Randall, but Randall later advised them that "[t]hey won't let me do it." R19-22-23, 64. By letters to EPD, Taylor reported that the plant had exceeded the maximum daily allowable discharges seventeen times, and explained that the discharges were due to "heavy rainfall," "miscommunication between operations supervision," "a slight miscalculation," and "storm, rainfall and process leaks." Govt. Ex. 10-ld, e, g. Taylor noted that the "waste water treatment operating efficiency and outfall discharge" was "positive[ly] affect[ed]" by LCP's decision not to replace a leaking brine tank. Govt. Ex. 10-1g.

In April 1993, the Board of Directors, with the approval of the bankruptcy court, removed Hansen as Chairman, President, and CEO of Hanlin after he attempted to expel the outside directors from the board. R19-122-23, 160, 167-68. The Board and the bankruptcy creditors' committee asked Randall to serve as LCP's interim CEO and Chief Operating Officer [COO]. R19-160; R21-195, 200. His primary focus was financial and, with the support of the bankruptcy creditors committee and court, he sought to sell the company to a responsible party who could operate the business and have the financial resources to deal with the various environmental conditions. R19-147-48, 164, 174-75; R21-200-01, 219. In this capacity, Randall received daily reports concerning the Brunswick plant's operations and problems. R16-97-98. After Hansen's removal as CEO, he was no longer a corporate officer and became a director and

employee. R19-136, 160, 168. Sometime later, the Board sent Hansen to Brunswick to help run the plant. R19-166-67.

Taylor reported five discharge violations in April, and indicated that two violations were due to a problem in the wastewater treatment system that had been corrected, one violation was attributable to rainfall, and one violation was due to leaks which had been repaired. Govt. Ex. 10-1h. Taylor indicated that "[a]n upset in the wastewater treatment system caused a release of ineffectively treated wastewater" but that "the discharge was rerouted until the system resumed normal operation." *Id.* Taylor reported 16 discharge deviations in May 1993, which he indicated were caused by an equipment failure which had been repaired, "overloading the wastewater treatment system," and rainfall. Govt. Ex. 10-li. In June, Taylor reported 21 excessive discharges which were attributable to "upsets" and "operational problems" in the wastewater treatment system and equipment failures. Govt. Ex. 10-lj and 10-1k. Hansen visited the plant in late June and began working with Taylor. R19-167.

In July 1993, Taylor resigned as plant manager. R21-245. Upon Taylor's resignation, Hansen assumed the running of the plant and served as plant manger from July through September 1993. R19-24, 167; R20-354. Taylor subsequently returned to the plant as a full time employee as a process or project engineer on the condition that he not have to "assume managerial type duties." R21-246. He remained involved in environmental issues, however, and in October 1993, questioned the assistant production manager regarding the loss of mercury. R20-325, 337-38.

The Georgia Environmental Protection Division notified LCP in writing in June 1993 that it proposed revoking the NPDES permit to discharge treated wastewater in Purvis Creek based on "continuous violations . . . since May 1992 of pH, total residual chlorine, and mercury." Govt. Ex. 13-1d at 1. It explained that, although it had provided LCP "Notice

of Violation" letters twice in 1992 and had requested that LCP "take all necessary measures to come into compliance," "these violations have continued" and "significant noncompliance" was documented in 10 out of 13 months from May 1992 through May 1993. *Id.* The notification summarized that there had been "no progress . . . in upgrading the plant or its operation" since the noncompliance had begun to be a serious problem. *Id.* at 2; R20-274-276. Randall submitted formal written comments on the revocation stating that "LCP has already taken steps to improve the situation by installing additional filter capacity, repairing or replacing equipment and reducing the load on the system" and referring to a 23 July plan addressing future corrective measures. Govt. Ex. 10-6 at 4.

In July and August 1993, Hansen directed the plant employees to begin pumping the wastes into the large "bunker" tanks that had once been used to store oil although he knew that the wastewater mixed with oil could not be run through the wastewater treatment system. R20-48, 183, 328-29, 350. The plant environmental/safety manager reported the use of the tanks to Randall in July. Govt. Ex. 10-7x. After the EPD moved to revoke the plant's permit, Hansen advised the employees to "increase the flow on the wastewater treatment system to a level that was to keep the water from running out the [cellroom] door" and into the lake. R20-358-59. During their respective terms as plant manager, Hansen and Taylor were advised of and observed "water [] flow[ing] out the back door of the cellroom" as a result of a break in the cellroom berms, and "overflow[ing] on the ground." R20-327-28, 335-36, 341. The employees complained to Hansen, Taylor, and Randall about "the water condition, the deterioration of the plant with the pipes, the leaks, and the safety equipment," and, despite assurances that conditions would improve "[a]s soon as [the plant] g[o]t some money," the plant did not get "any money" and conditions did not change. R21-146-50.

The NPDES permit was revoked on 23 September 1993. R20-275. LCP filed an appeal which stayed the revocation. R20-275. Although EPD sought a temporary restraining order, it was denied by the state court judge.[12] R20-302-03.

During this same period of time, Allied Signal and HoltraChem indicated interest as buyers, and a financial agreement was worked out in which Allied Signal would provide needed money, personnel, and raw materials or maintenance parts for the plant, including an extra wastewater treatment facility. R9-228, Exs. A & B; R19-149-51; R20-18, 80. As a part of the financial agreement, Allied Signal loaned employee Mark White to LCP to serve as plant manager in October 1993.[13] R19-152-53; R20-18. With the influx of Allied Signal's resources, conditions at the plant improved. R20-80. The purchase agreement eventually fell through and shortly thereafter the facility closed. After the plant closed, Randall, through the bankruptcy counsel, requested $1,500,000 in additional funds from the bankruptcy court to deal with the environmental im[illegible]t of closing but the request was denied. R9-228, Ex. [illegible]t 2, 7, Feb. 8, 1994, letter from M. Patrick M. Nuciarone.

The Georgia EPD turned the closed plant over to the U.S. Environmental Protection Agency (EPA) for cleanup and EPA estimate that the cleanup will cost more than $50

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[12] By letter, the bankruptcy creditors' committee advised the state judge of the bankruptcy proceedings and "the likely consequences that would result from any closing of the Brunswick plant." R9-228, Ex. B at 1. The committee represented that "even if actual production at [the plant] was to cease, Hanlin would have an obligation to continue to spend considerable amounts of money at [the] plant in order to avoid the possibility of an environmental catastrophe." *Id.* at 2. A possible environmental impact of shutting the plant down included "additional mercury leakage." R20-147; R19-83-84.

[13] White continued at the plant as manager until the plant closed. R20-18.

million. R20-380; R21-57. Taylor, as one of the ten LCP employees approved by the EPA to participate in the site cleanup, assisted in the decommissioning of the cellrooms and ran the water treatment plant built by the EPA. R21-55-56. The cleanup was paid for by the government and Hanlin's predecessors at the site: Allied Signal (successor to Allied Chemical), ARCO, and Georgia-Power Company. R21-39-40.

The government indicted Christian Hansen, Randall Hansen, Douglas Brent Hanson, and Alfred R. Taylor for conspiracy to commit environmental crimes at the site between 1 July 1985, and 1 February 1994, 18 U.S.C. § 371, (Count 1), and various substantive crimes.[14] R1-1-1. The charges included: violating the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(2)(A) and 18 U.S.C. § 2, by exceeding the NPDES permit between June 1993 and January 1994 (Counts 2-21); violating the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6928(d)(2)(A) and (e), and 8 U.S.C. § 2, by storing wastewater on the cellroom floor and permitting some to escape into the environment between 29 May 1993 and 1 February 1994 (Counts 22-32), storing wastewater in the Bunker "C" tanks between 23 July 1993 and 1 February 1994 (Count 33), and knowingly endangering employees by exposing them to impermissibly stored wastes and wastewaters between 29 May 1993 and 1 February 1994 (Count 34); violating the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9603(b)(3), by failing to notify the U.S. government of unpermitted releases of chlorine or wastewater into the environment between 21 July and 23 October 1993 (Counts 35-41); and violating the Endangered Species Act, 16 U.S.C. § 1538(a)(l)(B), 1538(g), and

[14] Two other plant employees, Duane Outhwaite and Christopher Dunn, were charged separately and entered into plea agreements. R8-200-7 n. 5.

1540(b)(1), by taking an endangered species, a Wood Stork, as a result of discharging mercury into the marsh, Purvis Creek, and the Turtle River (Count 42). R1 -1. Hansen was charged with Counts 1-42, Randall was charged with Counts 1-34 and 42, Hanson was charged with Counts 1-6, 10-22, 24, 26-32, and 34-42, and Taylor was charged with Counts 1-32, and 34-42. *Id.* Hanson, the former environmental and health and safety LCP manager, pled guilty to a CERCLA offense (Count 41) and the offense under the Endangered Species Act (Count 42) and testified against Hansen, Randall, and Taylor.[15] R3-83; R20-6. At the conclusion of the defendants' case, the district judge granted their motion for acquittal as to Count 42 but denied the motion as to all other charges. R6-123. Hansen was convicted of all counts, Randall was convicted of all charged counts, and Taylor was convicted of Counts 1-3, 10-11, 22-26, 29-32, 34-35, and 38-41. R22-214-15. Their renewed motions for acquittal and motions for judgment notwithstanding the verdict and/or for a new trial were denied. R7-145, 146, 153-54, 163; R8-200.

Hansen was sentenced to 108 months of imprisonment, a fine of $20,000, a special assessment of $2,050, and two years of supervised release. R8-214. Randall was sentenced to 46 months of imprisonment, a fine of $20,000, a special assessment of $1,700, and two years of supervised release. R9-236. Taylor was sentenced to 78 months of imprisonment, a special assessment of $1,000, and two years of supervised release. R8-215. Each defendant appealed, and was allowed to remain on bond pending appeal. R8-219, 221; R19-226, 238-40.

On appeal, Hansen raises four issues: (1) the district court erred in admitting the government's expert witness testimony; (2) the district court's instructions misstated the reasonable

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[15] Hanson was sentenced to eighteen months of imprisonment, and one year of supervised release on each count, concurrent. R8-123.

doubt standard, improperly applied the concept of reasonable corporate officer, improperly defined the elements of knowing endangerment, and effectively eliminated the mens rea requirement from each statutory violation; (3) the evidence was insufficient to support his convictions; and (4) the district court erred in concluding that it lacked the authority to depart from the applicable sentencing guidelines. Randall argues that: (1) district court erred by not granting his motion for judgment of acquittal because the evidence was insufficient to support his conviction for knowing endangerment under the RCRA and the government never proved causation on counts 2-33; (2) the district court's instructions were erroneous on the elements of the charged substantive offenses and on the responsible corporate officer instruction as an alternative basis for criminal liability; (3) the district court erroneously admitted high prejudicially and irrelevant evidence; and (4) the district court erred by declining to depart downward. Taylor maintains that the district court erred: (1) by not granting his motion for judgment of acquittal and for a new trial based on insufficiency of the evidence; (2) in its instruction concerning the wastewater treatment system; and (3) in sentencing him.

II. DISCUSSION

A. *Admission of Expert Witness Testimony*

Hansen argues that the district court erred in admitting testimony from government expert witness Daniel Teitelbaum because the government failed to disclose Teitelbaum's checkered history of credibility and the court failed to conduct a hearing regarding the testimony. Hansen also maintains that the district court erred in admitting the testimony of Teitelbaum and government expert witness Christopher Reh because the testimony was unreliable, irrelevant, and highly prejudicial. The government responds that Hansen waived the arguments regarding Teitelbaum's testimony by failing to object to the testimony at trial.

The week before trial, Hansen moved for a *Daubert*[16] hearing and to exclude the testimony of expert witnesses regarding certain allegedly scientific conclusions and exhibits. R4-94-95; R6-110-1. Noting that the motion was directed to the expert testimony regarding the effect of high mercury levels on endangered species as charged in Count 42, the district court denied it, finding that the motion did "not identif[y] the source, the substance, or most importantly the underlying methodology of this testimony" and that, therefore, there was "no underlying methodology or reasoning for the court to assess." R6-110-1-2, 4.

During the trial, Teitelbaum confirmed that he had previously testified as an expert witness, and explained that "it has been a regular portion of [his] practice over the years."[17] R20-230-31. Hansen neither objected nor examined Teitelbaum after the government moved to tender Teitelbaum as an expert, and the court directed that the jury consider him an expert in his field. *Id.* at 232.

Teitelbaum testified regarding the plant employees' potential exposure to hazardous substances. Based on his review of "the large number of biological samples," "many interviews," the "documents concerning the health and

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[16] *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). In *Daubert*, the Court held that, when "[f]aced with a proffer of expert scientific testimony, . . . the trial judge must determine. . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592 113 S. Ct. at 2796.

[17] On cross-examination, Teitelbaum stated that this was the first time that he had testified as "a consultant for the U.S. Attorney," but explained that he had testified "for OSHA many times," "for the Department of Justice a number of times," and for "the EPA." R20-255-56. He was asked whether he considered the government to be a "pretty good customer" for his services, and responded that he did not "take any money from the government" for consulting services. *Id.* at 256.

hygiene program," and other documents, he found "a substantial amount of spillage of sodium hydroxide," "numerous chlorine leaks," and spills and leaks of hydrochloric acid at the plant. R20-233-35; *see also* 248-49. He noted that, because the sodium hydroxide spillage had a very high pH and was quite caustic, contact with the spillage could cause a first- to third-degree burn, or even be lethal. *Id.* at 233-34. Teitelbaum explained that exposure to the chlorine leaks could cause "severe injuries to eyes, upper airways, and lungs, and, under some circumstances, death." *Id.* at 234. He commented that hydrochloric acid was a "classic poison" which would also cause burns and potential death. *Id.* at 234-35. Based on the biological samples, he concluded that the employees were in danger of death or serious bodily injury." *Id.* at 244-45, 248. Finally, Teitelbaum noted that the data showed the mercury levels in the workers' urine were "between two and five times the acceptable level of excretion, based on the World Health Organization or the NIOSH recommendations." *Id.* at 244-45. No objections were raised to his testimony. *Id.* at 232-63.

At sentencing, the probation officer noted that he had "discredit[ed]" one of Hansen's witnesses "because he was not even at the LCP Plant" and "did not have firsthand knowledge to see this." R13-26. Hansen's attorney responded that, based on the probation officer's theory, Teitelbaum's testimony should also be discounted "because he never went to the plant before it was shut down." *Id.* at 28. The district judge commented that Teitelbaum "made a very credible witness. I think the best witness that the Government had." *Id.* at 29.

We review for abuse of discretion both the district court's decisions regarding the admission of expert testimony and reliability of an expert, *Kuhmo Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176 (1989), and the denial of a *Daubert* hearing, *United States v. Nichols*, 169

F.3d 1255, 1263 (10th Cir. 1999). "Absent an objection, we can review the challenged evidence only for plain error. *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1192 (11th Cir. 1995).

Scientific expert testimony is admissible if "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *City of Tuscaloosa v. Harcros Chems, Inc.*, 158 F.3d 548, 562 (11th Cir. 1998). In *Daubert*, the Supreme Court suggested a flexible inquiry regarding the methodology considering such factors as "whether it can be (and has been) tested," whether it "has been subjected to peer review and publication,'' the known or potential rate of error, "the existence and maintenance of standards controlling the technique's operation, and the degree it is accepted as reliable within the relevant scientific community." 509 U.S. at 591, 593-94, 113 S. Ct. at 2795-96. *Daubert* hearings are not required, but may be helpful in "complicated cases involving multiple expert witnesses." *City of Tuscaloosa*, 158 F.3d at 564-65 n. 21. A district court should conduct a *Daubert* inquiry when the opposing party's motion for a hearing is supported by "conflicting medical literature and expert testimony." *Tanner v. Westbrook*, 174 F.3d 542, 546 (5th Cir. 1999). Consistent with *Daubert*, the evidence must be scientifically related to the disputed facts at issue in the case. *Allison v. McGhan Med. Corp.*, 184 F. 3d 1300, 1312 (11th Cir. 1999).

Hansen's motion for a *Daubert* hearing was neither addressed to the charges to which Teitelbaum testified, or his testimony in general, nor supported by the source, substance, or methodology of the challenged testimony. Hansen failed

to object to either Teitelbaum's qualification as an expert or his testimony during trial. Teitelbaum's testimony was based on his review of biological samples, interviews, and documents, and assisted the truer of fact in understanding the potential injuries that could result from the conditions at the plant. The district judge did not abuse his discretion by denying the motion or by admitting the testimony.

To the extent that Hansen raises a *Brady* [18] claim that the government suppressed exculpatory or impeachment evidence by failing to disclose Teitelbaum's "checkered" past, we find that it is without basis. In order to state such a claim, a defendant must show (1) "that the government possessed evidence favorable to the defendant (including impeachment evidence). . .; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence. . . (3) that the prosecution suppressed the favorable evidence. . .; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989) (per curiam). In this case, the evidence which Hansen alleges the government failed to disclose consists of court opinions either disregarding or discrediting Teitelbaum's testimony. Although Hansen argues that the government knew of this discredited testimony based on Teitelbaum's previous testimony for the government, Hansen fails to show that the government was in actual possession of the information or actually suppressed it. Further, the information was available to Hansen through reasonable diligence both before and

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[18] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) ("The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

during the trial.[19] The cases were all available through legal research and information on them could have been, but was not, addressed during Teitelbaum's testimony. Finally, the cases relied on by Hansen all relate to Teitelbaum's testimony in tort actions as to causation of a specific injury. They do not, therefore, have probative value as to his testimony regarding potential health effects of the chemicals or the employees' risk of death or serious injury after exposure to these chemicals. Hansen is unable to show a reasonable probability that the information would have changed the outcome of the proceedings.

Christopher Reh, an employee of the National Institute for Occupational Safety and Health ("NIOSH"), also testified for the government. R20-192. The district judge qualified him as an expert in the field of industrial hygiene.[20] *Id.* at 194.

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[19] Hansen argues that Teitelbaum's testimony was "discredited" in four cases: *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997), *Sweger v. Texaco, Inc.*, Nos. 88-1781, 88-1834 and 88-2745 (10th Cir. Feb. 22, 1991); *Land v. United States*, 35 Fed. Cl. 345 (1996), and *National Bank of Commerce v. Associated Milk Producers, Inc.*, 22 F. Supp. 2d 942 (E.D. Ark. 1998). In *General Elec. Co.*, the Court found that the district court did not abuse its discretion in excluding the testimony of Teitelbaum (and other expert witnesses) because the studies on which he relied were not sufficient to support his conclusion. 522 U.S. at 146-47, 118 S. Ct. at 519. In *Sweger*, the court found that Teitelbaum's testimony did not provide the necessary certainty to establish causation. *Sweger*, slip op. at 1, 5-6. In *Land*, Teitelbaum appeared as the plaintiffs' medical expert. 35 Fed. Cl. at 352 n. 7. The hearing officer found Teitelbuam's "'preliminary' medical opinion" regarding the cause of the plaintiffs' injuries to be "of little value because Dr. Teitelbaum did not conduct physical examinations of the plaintiffs." *Id.* In *National Bank of Commerce*, the court found that Teitelbaum's view of the causation of the plaintiffs cancer was "undercut by the inadequacy of . . . reliable scientific proof of causation." 22 F. Supp. at 967.

[20] Neither Hansen nor his codefendants questioned Reh regarding his background or his area of expertise and raised no objections to Reh's qualification. R20-194.

Reh explained that he was assigned to the Brunswick plant as the project officer after NIOSH received "a valid request for a health hazard evaluation" from one of the plant's unions in 1987.[21] *Id.* at 196. He said that, during the initial site visit, he and his team met with Taylor, a plant engineer, and a few union representatives to discuss the request.[22] *Id.* at 196-98. They visited the plant, and observed "mercury in many places on the cellroom floor in cracks or crevices," and passively monitored mercury exposure in the workers' "breathing zone." *Id.* at 198-99. They found that the plant was not using the creatnine monitoring scale, but were reporting mercury levels by "micrograms per liter." *Id.* at 204. The monitors found that mercury exposure exceeded the NIOSH and OSHA recommended levels.[23] Taylor's objection to further testimony from Reh on the grounds of relevance was overruled. *Id.* at 201. Reh and his team advised Taylor of their findings by letter and recommended use of creatnine correction urine mercury monitoring which would indicate the amount of mercury per gram of creatnine. *Id.* at 201-03; Govt. Ex. 40-lb. From the results of the first visit, the team made a second visit to conduct a more in-depth study in 1988. R20-202. During the second visit, the team used an active sampling method to determine 28 workers' breathing zone exposure levels, collected urine samples from 58 workers, and administered questionnaires to and conducted physical

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[21] Reh indicated that they were requested to evaluate the health hazards associated with mercury, chlorine, and hydrochloric acid. *Id.* R20-199, 203; Govt. Ex. 40-lb.

[22] The NIOSH team consisted of Reh, a medical doctor, and another industrial hygienist. R20-198.

[23] Reh explained that the MOSH recommended exposure levels ("REL") were 50 micrograms of mercury per cubic meter of air and that the OSHA permissible exposure levels ("PEL") are 100 micrograms of mercury per cubic meter of air. R20-200. He said that all of the sixteen monitored workers showed RELs above 50, and eleven of the monitored workers had levels above the PEL. *Id.* at 200-01.

examinations of 65 workers. *Id.* at 205-07. Taylor was provided with a written interim report in 1988 and a final report in 1991, both of which showed that workers had mercury levels above recommended standards.[24] *Id.* at 207-08, 210, 214; Govt. Ex. 40-lc and 1d.

The government offered Reh's testimony to show that the workers were placed "in imminent danger of death or serious bodily injury" and that Hansen, Randall, and Taylor were aware of the workers' exposure to hazardous substances. This testimony supports both of those propositions. The district court did not abuse its discretion by admitting the testimony of Reh.

B. *Insufficiency of the Evidence*

We review the denial of a motion for a new trial for abuse of discretion, and the denial of a motion for judgment of acquittal *de novo*. *United States v. Pistone*, 177 F.3d 957, 958 (11th Cir. 1999) (per curiam). To uphold the denial of a motion for judgment of acquittal, we "need only determine that a reasonable fact-finder could conclude that the evidence established the defendant's guilt beyond a reasonable doubt." *Id.* When considering the sufficiency of the evidence, we "view the facts and draw all reasonable inferences therefrom in the light most favorable to the government." *United States v. Slocum*, 708 F.2d 587, 594 (11th Cir. 1983).

1. Position of authority

"To prove aiding and abetting, the government must demonstrate that a substantive offense was committed, that the defendant associated himself with the criminal venture, and that he committed some act which furthered the crime."

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[24] Reh reported that they found that 29 of the tested 58 workers had urine mercury levels which exceeded the World Health Organization recommended standard of 50. R20-208, 210. The average level was 136 micrograms per gram of creatinine, with a range from 2 to 689. *Id.* at 210.

United States v. Hamblin, 911 F.2d 551, 557 (11th Cir. 1990). "[T]he government must show that the defendant shared the same unlawful intent as the actual perpetrator" but does not need to prove that "the defendant was present at the scene when the crime occurred, or that he was an active participant." *Id.* at 557-58; *United States v. Pepe*, 747 F.2d 632, 665 (11th Cir. 1984) ("aider and abettor. . . need not even be present"). "Encouraging" a violation and "discouraging" the reporting of the violation, *United States v. Sinskey*, 119 F.3d 712, 718 (8th Cir. 1997), and "personally attempting to avoid [a violation's] detection by the [RCRA] inspectors," *United States v. Self*, 2 F.3d 1071, 1089 (10th Cir. 1993), have been held sufficient to show that a defendant aided and abetted the commission of a crime.

The indictment alleged that the defendants, "after learning that the Brunswick facility was disposing of hazardous wastes. . . without a RCRA permit, continued to operate the Brunswick facility in such a manner as to continue the disposal of these hazardous wastes without expending adequate funds. . . to prevent the disposal of such hazardous wastes into the environment." R1-1-11. The jury was instructed that the defendants were responsible for the acts of others that they "willfully directed," "authorized," or aided and abetted by "willfully joining together with [another] person in the commission of a crime." R22-181. The district court denied Taylor's motion to acquit or for a new trial on these charges finding that "the Defendants worked for LCP in positions of responsibility and authority while. . . the violations took place." R8-200-23.

a. Hansen

Hansen maintains that the evidence failed to show that he was in a position of authority after he was deposed as CEO in April 1993 until he began serving as plant manager on 16 July 1993, and not after he was officially replaced as plant manager by Allied employee Mark White on 18 October

1993. Therefore, he contends that the district court erred in not granting his motion for judgment of acquittal as to the 18 counts that occurred after 18 October 1993 (Counts 6-9, 14-15, 19-21, 23, 25, 29, 30-32, 38-40), the two counts that occurred between April and July 1993 (Counts 2 and 10), and the count that arose on 22 October 1993 (Count 33).

The testimony at trial indicated that Hansen was aware that wastewater was permitted to flow out the cellroom back door in June 1993,[25] and directed the use of the old Bunker C storage tanks for storage of wastewater, including the inadequately treated wastewater from the treatment system, from July through September 1993.[26] Although the acts continued after Hansen left his decision-making position, the acts occurred at his direction. This evidence was sufficient for the jury to reasonably conclude beyond a reasonable doubt that his acts were in furtherance of the violations. The district court did not err in denying Hansen's motion for judgment of acquittal or motion for new trial.

b. Randall

Randall claims that the government presented no evidence that he personally treated, stored, or disposed of a hazardous waste, personally effected a CWA violation, or instructed an agent to do so. He maintains that, under the laws of bankruptcy and corporate governance, he lacked the authority to close the plant or to allocate the funds for the needed

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[25] Testimony of LCP former assistant production manager James Dunn, R20-327-28, 341.

[26] Testimony of former LCP health and safety manager Douglas Brent Hanson, R20-48-49, LCP maintenance handler and expeditor George Mower, P20-1 83, and LCP former production manager Duane Outhwaite, R20-350. Outhwaite testified that the storage tanks were used for wastewater overflow to keep the inadequately treated wastewater from "running out the door" and to help prevent the deep pools of wastewater from forming on the cellroom floors. R20-350, 358.

capital improvements. He contends that LCP needed the bankruptcy court's approval to use the bankruptcy estate's assets, or to obtain a new debt, to perform the needed repairs at the Brunswick plant.

In February 1994, LCP applied to the bankruptcy court for the funds "to shutdown" the plant and for new equipment, but the motion was denied. Def. Randall Ex. 1, Amended Notice of Motion at 5; R9-228, Ex. C and 8 Feb letter. Hanlin Board of Directors member James Mathis testified that Randall was responsible for "run[ning] the day-to-day operations of the company" once he became the interim CEO and COO. R19-160. He said that the Board was "very interested in whether the environmental problems-whether we were in a position of compliance with the environmental regulations. But the information that we had indicated that, really, compliance was not a problem." *Id.* at 164. He explained that, as a result of the weekly reports on the plant's operations, the Board believed that "there were really no excursions of any significance going on". *Id.* at 165.[27] Mathis said that Randall "had the primary responsibility" for providing information regarding the environmental compliance issues to the Board and that Hansen fed "information to Randall in that regard." *Id.* at 166. He agreed that the decision to sell the plant would have been a board decision requiring the approval of the bankruptcy court. *Id.* at 174-75.

LCP, as a debtor in possession, could "use the property of the estate in the ordinary course of business," but needed court approval to "use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(c)(1) and (b)(1). It could obtain unsecured

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[27] Mathis testified that there were places on the report forms for the "number of excursions" or environmental noncompliances which "were filled in with 'zeros' each time." R19-165. He said that they later leamed that the zeros were clerical errors. *Id.*

credit. . . in the ordinary course of business," but needed court approval "to obtain unsecured credit or to incur unsecured debt other than" "in the ordinary course of business." *Id.* at 364(a) and (b). Bankruptcy does not insulate a debtor from environmental regulatory statutes. In reviewing an injunction to clean up a hazardous waste site, the Supreme Court commented:

> [W]e do not suggest that [the debtor's] discharge [in bankruptcy] will shield him from prosecution for having violated the environmental laws . . . or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. . . [W]e do not hold that the injunction . . . against any conduct that will contribute to the pollution of the site or the State's wasters is dischargeable in bankruptcy. . . Finally, we do not question that anyone in possession of the site. . . must comply with the environmental laws. . . Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.

Ohio v. Kovacs, 469 U.S. 274, 284-85, 105 S. Ct. 705, 710-11 (1985). *See also Midatlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 407, 106 S. Ct. 755, 762 (1985) (A bankrupt debtor in possession "may not abandon property in contravention of a . . . regulation that is reasonably designed to protect the public health or safety from identified hazards.")

Although Randall claims that his role as Executive Vice-President and acting CEO was limited to financial matters, he also received daily reports about the plant's operations and environmental problems, R16-97-98, R21-359, wrote and received memos regarding specific plant operational problems, Govt. Ex. 104, 1-6f, 1-8a, 1-12, received monthly written environmental reports, Govt. Ex. 10-1o-10-1nn, 10-7c-7d, 10-7f and oral environmental reports, R21-64, 359. He

admitted that Hanlin's bankruptcy was not an excuse for violating environmental laws. R21-219-21. There is no indication that he asked the Hanlin Board or the bankruptcy court to close the plant. The evidence indicates that he apparently misled them into believing that environmental compliance was not a problem. After the Georgia EPD attempted to revoke the plant's NPDES permit in June 1993, Randall contested the revocation, explaining that the plant's CWA violations were due to a lightning strike and equipment failures, and asserted that "LCP has already taken steps to improve the situation." Govt. Ex. 10-6. This evidence was sufficient for the jury to conclude that Randall actions were in furtherance of the violations.

c. Taylor

Taylor argues that he should not be held responsible for the environmental violations that occurred after he resigned as plant manager, specifically counts 2-3, 25, 29-32, 38-41. Taylor resigned as plant manager on 16 July 1993, R21-245, but returned shortly thereafter as a project engineer and continued in that position until the plant closed, R21-246-47, 317-18. As project engineer, Taylor was directly involved in responding to the plant's environmental and safety problems and, at Hansen's request, developed a list of short-term solutions to the problems with estimated costs. R20-338; R21-247-48. Taylor's proposed solutions were subsequently funded. R21-247-48.

Although Taylor left his managerial position, he continued to work in a position in which he directed or authorized acts of the employees on environmental and safety problems.[28]

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[28] Despite Taylor's resignation as plant manager and his re-employment as project engineer, he was considered to be in a management position. See R20-152 (D. Brent Hanson testified that Taylor was his immediate supervisor both before and after his resignation and re-employment); id at 335 (Dunn testified that Taylor "probably

Testimony at trial indicated that, in October 1993, Taylor was aware of the wastewater overflow from the cellrooms, the excess loss of mercury, and the use of the tank cars for wastewater storage, and that he supervised the release of the overflow.[29] This evidence was sufficient for the jury to conclude beyond a reasonable doubt that these acts were in furtherance of the violations. The district court did not err in denying his motion for a new trial.

2. Hazardous substances or materials

Taylor and Hansen argue that the government failed to prove that the untreated wastewater contained enough mercury and caustic to meet the environmental laws' definition of hazardous substances or materials, or that the untreated wastewater was improperly stored.

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would have been plant manager" in late 1993), 337 (Dunn said that in "October of '93 I would assume [Taylor] was plant manager."); *id.* at 312, Govt Ex. 13-4 (19 January 1994 letter from Georgia EPD acting unit coordinator Susan Eason to "Plant Manager" Taylor in which she referenced Taylor's explanation for "NPDES excursions" at a 6 December 1993 meeting). *But see* Govt. Exs. 13-2ff, gg, hh, ii, and jj (letters from Mark S. White, as "Plant Manager," to EPD dated October-February 1994).

[29] Testimony of James Dunn. R20-335-39. Taylor directed a memorandum addressing the mercury losses and suggesting a solution to LCP employee Chris Dunn on 4 October 1993. Govt. Ex. 19-5. Dunn responded "yes" when asked whether Taylor was aware of the overflow release from the backdoor of the cellroom. R20-327-28. Dunn testified that Taylor observed the overflow "on the ground." *Id.* at 336. Dunn said that he told Taylor he was having trouble pumping the waste into the tank cars and that mercury loss was due to "leaks coming out of the products or it was tied up in hazardous waste muds." P20-337,339. By memorandum, Taylor proposed a flow plan for the projected waste streams of "19 to 125 gallons per minute" when the wastewater treatment system was only working at a 40 gallon per minute capacity. *Id.* at 340; Govt Ex. 19-4a. Wilbur Outhwaite testified that Taylor advised that the employees needed to empty the wastewater from the tank cars. P20-356.

a. Hazardous substances as defined

OSHA chemist Clinton Leroy Merrell testified that samples which were submitted from LCP on 9 September 1992 tested as containing 8 to 30 parts per million of mercury, and six to ten-percent caustic, with a pH of 14. R21-163, 165-67; Govt. Exs. 45-6, 45-9. Former LCP plant manager Hugh Leroy Croom testified that, in January 1993, the untreated wastewater may have had "a high pH, and . . . some mercury," but would not have contained mercury sludge. R16-91, 131-32. He said that the pH could be high enough to be a danger "at times" but that it did not stay high and varied according to the spills. *Id.* at 132; R19-35-36. However, he testified that muds containing mercury and caustic were washed onto the cellroom floors every three or four days when the treatment system's filters were back washed. R16-127-28; R19-103. When asked whether the wastewater on the cellroom floors would be considered a hazardous waste, Croom responded "[m]ost of the time, probably it was." R16-1 12-13 *see also Id.* at 128 (Croom admitted that wastes on the cellroom floor were listed as hazardous wastes).

Dr. Teitelbaum testified that a fall and submersion into caustic soda with a pH of 14 would cause a third-degree burn over the entire body with a likelihood of death. R20-241-42. LCP former employee Duane Carver testified that, some time between 1987 and 1993, he stepped into the cellroom sump hole and went in up to his waist. R19-226-28. He knew that the pH was "pretty high" because he quickly felt it. *Id.* at 228. He showered and was able to get most of it off so that he "didn't get burned all the way" and did not seek medical attention. *Id.* at 229-30, 251.

Environmental Protection Agency regulatory expert Paul Peronaud explained the hazardous waste classifications to the

jury, R21-11-13, and the jury was instructed as to various types of hazardous wastes, R22-199-200.[30]

The Waste Water Treatment Operators Logs for the periods of the indictment showed that the wastewater often contained more than 200 parts per billion of mercury.[31] Govt. Exs. 4, 5,

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[30] Specifically, the jury was instructed:

> [T]he following wastes are listed as hazardous wastes under the Resource Conservation and Recovery Act, that is, RCRA:
>
> K- 106 is wastewater treatment sludge from the mercury cell process in chlorine production.
>
> K-071 is brine purification muds from the mercury cell process in chlorine production, where separately prepurified brine is not used.
>
> And U-151 is simply mercury.
>
> Now you are instructed that a solid waste exhibits the characteristic of toxicity for mercury if, using the test methods set forth in the regulations, a representative sample of the waste contains mercury at a concentration of equal to or greater than 0.2 milligrams per liter.
>
> Under the law, liquid wastes which are "corrosive" are identified as hazardous wastes. A liquid waste is considered to be corrosive if a representative sample of the waste is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5.
>
> I instruct you that when a hazardous waste listed under the regulations is mixed with a solid waste, the resulting mixture is a hazardous waste if the reason for the listing of the hazardous waste is that it is a toxic waste.

P22-199-200.

[31] LCP former employee Carver explained that the line for "Discharge HC (ppb)" showed "the mercury level in the discharge water coming from the wastewater system." R19-209. The logs provided for thirteen readings per day, but readings were typically taken only twelve times per day. Mercury levels were recorded as above 200 for nine readings on 17 April, six readings on 28 June, eight readings on 28 August, four readings on 29 August, three readings on 12 September, four readings on 6 October, two readings on 9 October, three readings on 13 October, nine readings on 18 October, six readings on October 22, and

6-1. Former LCP employee Dunn testified that Taylor directed the employees to "put a sign up" labeling the wastewater in the rail cars as "[h]azardous waste materials." R20-345. Taylor testified that the pH of the plant's wastewater was normally between seven and ten, and in concentration of eight to ten percent. R21-262, 264.

> A "hazardous waste" is defined as a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
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> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed.

42 U.S.C. § 6903(5). Hazardous wastes are categorized as either "listed" hazardous substances or "characteristic" hazardous substances. 40 C.F.R. § 261.3(a); R21-11-15. The "characteristic" hazardous substances are not per se hazardous but may be classified as hazardous if, because of a mixture with a hazardous substance, testing proves that the substance exhibits characteristics of hazardous waste. 40 C.F.R. §§ 261.3(a)(2)(i) and 261.20(a). Characteristics of hazardous waste include ignitability, corrosivity, reactivity, and toxicity. 40 C.F.R. §§ 261.21, 261.22, 261.23, and 261.24. Wastewater containing mercury is classified as a characteristic hazardous substance when the water contains 200 parts per billion or more of mercury. *Id.* at §261.24 (a),

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nine readings on 5 November, 1993. Govt. Exs. 4, 5, 6-1. The logs show that the system was not working during readings on 17 April, 21 June, 27-28 June, 29 August, 12 September, 6-9 October, 12-13 October, and 18-21 October 1993. *Id.*

Table. "Wastewater treatment sludge from the mercury cell process in chlorine production" is listed as hazardous waste K106. *Id.* at § 261.32. Wastewater containing caustic is classified as a characteristic hazardous substance when the water "has a pH less than or equal to 2 or greater than or equal to 12.5." *Id.* at § 261 .22(a)(1). Once solid wastes are mixed with sludge or caustic, they are defined as hazardous. *Id.* at § 261.3(a)(2)(iv).

Where there is no sampling of the actual wastes, the government may prove the hazardous nature of the material by inventories, hazardous waste logs, internal memoranda, and trial testimony. *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 614 (5th Cir. 1991). The government is not required to prove that material is hazardous by EPA testing. *United States v. Self*, 2 F.3d 1071, 1086 (10th Cir. 1993). We find that the testimony of the former LCP employees and the wastewater logs were sufficient for the jury to find that the untreated wastewater contained enough mercury and caustic to meet the environmental laws' definition of hazardous substances or materials.

b. Storage of hazardous materials.

Taylor and Hansen maintain that the accumulation of wastewater on the cellroom floors did not violate federal law because the wastewaters were not stored there for the statutory requisite of 90 days. Croom testified that hazardous wastewater was on the cellroom floors "[a]t times," R16-114, and that hazardous materials were shipped, turned over, or treated within 90 days, R19-41. In response to a question as to whether wastewater on the cellroom floors was a regular occurrence in 1992, he responded that it was in both cellrooms in 1992, but when he left "it was just mostly in #2." R16-114. Former LCP employee Roger Cooper testified that on 28 June 1993, although wastewater was pumped to the railcars for storage from cellroom two, the cellroom one floor was dry. R19-275-76, 28 1-82; Govt. Ex. 6-1. He explained

that they "tried to keep [the wastewater in cellroom one] pumped over to #2 cellroom" because of the possibility that water would escape from cellroom one as a result of cracks in its floor. R19-284-85. Dirt dikes were constructed in the cellrooms to prevent the wastewater from leaking, but the dikes were frequently breached. R19-256; R25-26. The cellrooms were often "full of water" so that the employees had to wade into standing wastewater to repair the pumps. R20-318; R19-205.

Hazardous waste generators are permitted to "accumulate hazardous waste on-site for 90 days or less without a permit" if "the waste is placed" in tanks visibly marked with "[t]he date upon which each period of accumulation begins" and clearly labeled as "Hazardous Waste." 40 C.F.R. § 262.34(a)(l)(ii), (2), and (3). A "tank" is "a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials . . . which provide structural support." 40 C.F.R. § 260.10.

There was no evidence that suggested that the cellrooms, in which earthen berms were constructed to contain the wastewater, were marked with the date of accumulation or labeled as containing hazardous wastes and thus qualified as "tanks." The testimony and logs indicate that the wastewater, which may have abated in cellroom one during various periods of time, remained in cellroom two and was present for more than 90 days. Therefore, the evidence was sufficient for the jury to find that the wastewater was improperly stored.

3. Knowing Endangerment Under RCRA

Hansen, Randall, and Taylor argue that the evidence was insufficient to convict them for knowing endangerment. They acknowledge that the government may have shown that they "could have been aware" of the inherent dangers of working in a chlor-alkali plant, but argue that it failed to show that they knew and had an actual belief that the conduct

which allegedly violated the environmental laws was substantially certain to cause death or serious bodily injury to others. Specifically, they maintain that, while the evidence showed that the employees were exposed to mercury, the evidence did not show that they were endangered due to any RCRA violation. They contend that the evidence of the employees' exposure to caustic was not sufficient to support the conviction for knowing endangerment. They claim that the government did not show that they had actual knowledge that their conduct in causing the RCRA violation was at that time substantially certain to place the employees in imminent danger of death or serious bodily injury. They also posit that there was no evidence that they were participants in any alleged conspiracy.

For a conviction of knowing endangerment under the RCRA, the government must prove that the defendants knowingly caused the illegal treatment, storage, or disposal of hazardous wastes while knowing that such conduct placed others in imminent danger of death or serious injury. 42 U.S.C. § 6928(e). A defendant acts "knowingly" "if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury." *Id.* at 6928(f)(l)(C). The defendant must have possessed "actual awareness or actual belief." *Id.* at 6928(f)(2)(A). Circumstantial evidence, "including evidence that the defendant took affirmative steps to shield himself from relevant information," may be used to prove the defendant's awareness or belief. *Id.* The knowing endangerment statute was drafted to "assure to the extent possible that persons are not prosecuted or convicted unjustly for making difficult business judgments where such judgments are made without the necessary scienter" "however dire may be the danger in fact created." S. Rep. 96-172, at 37-38 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5036-38. The penalties imposed by the knowing endangerment section were "designed for the occasional case where the defendant's knowing conduct

shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." *Id.* at 38, 1980 U.S.C.C.A.N. at 5038. We have held that "[t]he government need only prove that a defendant had knowledge of the general hazardous character of the chemical" and knew "that the chemicals have the potential to be harmful to others or to the environment." *United States v. Goldsmith*, 978 F.2d 643, 645-646 (11th Cir. 1992) (per curiam) (internal quotations and citation omitted). "[W]hile knowledge of prior illegal activity is not conclusive as to whether a defendant possessed the requisite knowledge of later illegal activity, it most certainly provides circumstantial evidence of the defendant's later knowledge from which the jury may draw the necessary inference." *Self*, 2 F.3d at 1088.

The statute defines "serious bodily injury" as "(A) bodily injury which involves a substantial risk of death; (B) unconsciousness; (C) extreme physical pain; (D) protracted and obvious disfigurement; or (E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 42 U.S.C. § 6928(f)(6). A condition which may cause one of the statutorily defined conditions is sufficient to show "serious bodily injury." *See United States v. Protex Industries. Inc.*, 874 F.2d 740, 743 (10th Cir. 1989) (finding that a serious bodily injury was suffered by employees who contracted psychoorganic syndrome which may cause a mental faculties impairment).

a. The Evidence of Endangerment

Former LCP employees testified that they suffered serious skin and respiratory conditions from the wastewater on the cellroom floors.[32] A November 1992 memorandum from

[32] Hugh Croom explained that "when the pH was high [in the wastewater on the cellroom floors] and somebody stepped over in it, it could easily burn their skin on their legs." R16-121. He volunteered that caustic could "peel the skin off" a person if he or she fell into it. R19-107.

Taylor to Randall showed Taylor's concern for needed repairs "to avert severe safety and environmental problems." Govt. Ex. 1-5. The urinalysis testing on employees showed "an increase" in the number with mercury levels which exceeded the 150 action level from 1986 to 1993. R21-294-96. Taylor admitted that most of the employees in the cellroom were removed to other plant locations "before any medical condition occurred" but said that he did not see any "reason to draw any correlation between" the rise in the number of employees exposed to excess mercury and the dumping of hazardous wastes and mercury. *Id.* at 294, 296.[33]

Expert testimony and reports linked exposure to mercury and caustic to a variety of serious health problems. The National Institute for Occupational Safety and Health (NIOSH) report on sodium hydroxide caustic indicated that local contact with caustic could result in "extensive damage to tissues, with resultant blindness, cutaneous burns, and perforations of the alimentary tract," with potential for development of "squamous cell carcinomas." Govt. Ex. 17-

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He said that airborne mercury could cause problems because of the potential for accumulation in the body. *Id.* at 108. Duane Carver testified that he received second- and third-degree burns on his thighs, R19-182, 197, and that he and other employees shoveled mercury off the cellroom floors, R19-192. He explained that there was "plenty" of mercury to see "under the mud and also beaded up on top in the mud." *Id.* He said that "[t]here would be so much [mercury] that it would be running off of the mud" and that "[y]ou could get a shovelful and lean your shovel over, and the mercury would just run off the shove] onto the floor." *Id.* at 192-93. John Baker testified that the wastewater "would cause severe burns." *Id.* at 245.

[33] Taylor commented that "[j]ust because the trend happened to be the same on two completely unrelated events, does not necessarily tie them together." R21-296. He said that he "noticed a similar trend on two completely unrelated events." *Id.* at 297. He admitted "that the mercury vapor levels in the workplace did increase" and that "drums of dried waste can be a source of mercury." *Id.* at 297-98.

7b. The NIOSH report on inorganic mercury warned of the effects of mercury and mercury vapors to the central nervous system. Govt. Ex. 17-7c. Dr. Teitelbaum testified that exposure to caustic could cause burns ranging from first- to third-degree and could be lethal, and that exposure to mercury could cause mild tremors, personality changes, some detectable neurological abnormalities, changes in kidney function to severe kidney damage with potential death, and immune system problems. R20-229, 239-42. Dr. Teitelbaum opined that the employees were in danger of death or serious bodily injury." R20-248. The evidence was sufficient for the jury to find that the defendants placed others in danger of death or serious bodily injury.

b. The Evidence of *Mens Rea*

The evidence showed that Hansen, Randall, and Taylor knew that the conditions of the plant were dangerous and that the conditions posed a serious danger to the employees. LCP former employee Wilbur Duane Outhwaite testified that he voiced his opposition to the use of the Bunker "C" storage with Hansen, and that Hansen responded that it was "his decision to make, and he decided to use them." R20-350. LCP acting plant manager Hugh Croom discussed his concerns regarding the dangerous conditions in the cellroom and the danger to the employees with Randall. R16-129-30. Croom and LCP former employee Outhwaite testified that Randall received daily reports from the plant managers concerning plant operations and "safety problems." R16-97-98; R20-359, 374. Randall was aware of the water on the cellroom floor and "wouldn't say that [he] wasn't unaware of the hazard," but thought that the walkway was "an acceptable resolution" to "eliminating the hazard to the employees while we worked to dry the cellroom floor." R21-224-25. He conceded that he was aware that the company was cited for willful violation of OSHA safety regulations as a result of water on cellroom floors. *Id.* at 225; Govt. Ex. 10-7i. Jesse

Jones, a former LCP employee and a union representative, met with Randall to discuss the employees' safety issues, and Randall promised the needed repairs. R21-148. He said that he discussed the safety concerns, specifically "the water condition, the deterioration of the plant with the pipes, the leaks, and the safety equipment[]" with Hansen and Taylor. *Id.* at 146. Between 3 August 1993, and 4 February 1994, Randall was sent 22 reports listing 110 different violations of the NPDES standards. Govt. Exs. 10-1o-10-1nn. As LCP's environmental manager, Brent Hanson regularly advised Randall of the plant's environmental problems "[w]henever he was interested in things" and by monthly reports. R20-64-65.

As early as 1988, NIOSH informed Taylor that the plant employees had "extremely high" levels of mercury in their bodies which created "an unacceptably high potential for health effects," and that the mercury-contaminated wastes should be kept in vapor-proof containers. Govt Ex. 40-1c at 2. Despite this, the employees' exposure to high levels of mercury continued. In 1992, Taylor addressed his concerns about "severe safety" problems in a memorandum to Randall. Govt. Ex. 1-5. Taylor was aware that, during the spring of 1993, 23 cellroom employees were removed from their duty in the cellrooms due to their high levels of mercury and that the mercury level in the workplace increased. R21-294-95, 297. Taylor was aware of and concerned by the mercury-contaminated waste which was stored in drums in the cellrooms' basement and which was emitting elevated levels of mercury fumes. *Id.* at 298-303. He admitted that the mercury-contaminated mud on the cellroom floors posed a health risk and needed to be monitored. *Id.* at 301-02. He testified that, on occasion, he would get into the water wearing protective equipment to make repairs and improvements to the pumps, and admitted that, if the wastewater got onto bare skin and was caustic, "you would start to feel a little burning or a little heat sensation" but that

it could be neutralized by washing with the safety solution. *Id.* at 263-64. He said that such burns were "not unusual" in a caustic soda manufacturing plant through employee carelessness and equipment failures. *Id.* at 264.

c. Consent to the Risks

The RCRA knowing endangerment provision can be affirmatively defended if "the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of-A) an occupation, a business, or a profession." 42 U.S.C. § 6928(f)(3). The evidence showed that the plant's environmental violations seriously endangered the employees and were not typical to chlor-alkali plants. Hugh Croom, the plant manager for the LCP chlor-alkali plant in North Carolina, testified that the dangerous conditions in the Brunswick plant were not present in the North Carolina plant because the North Carolina plant had adequate waste treatment equipment and facility maintenance. R16-108-09, 127-29; R19-32-34, 52, 107-09, 110-11. He said that he discussed his concerns regarding the environmental issues, the wastewater treatment system issues, and the dangers to the employees with Randall and with Taylor. R16-129-30. LCP environmental manager Brent Hanson noted that, although covering mercury with water to limit mercury vapors was an accepted practice within the chlor-alkali industry, it was usually practiced "in a little more confined manner" than the condition of the cellrooms, it was not an industry practice to allow such quantities of mercury to accumulate on the cellroom floors, and he knew of no other chlor-alkali plants that permitted such a condition to exist. R20-145, 153. Dr. Teitelbaum testified that, although he did not think that "you can get a zero risk" in a chlor-alkali plant, he thought "you can make chlor-alkali plants safe so that

workers under everyday conditions are extremely unlikely to be hurt." R20-245.[34]

The employees also did not freely consent to conditions at the plant. They complained to management, including Hansen, Randall, and Taylor, about the dangerous working conditions, and refused to work in the cellrooms. Union representative and former plant employee Jesse Jones testified that LCP suspended nine employees who refused to "go underneath the cellroom to repair the pump" because of the wastewater on the cellroom floor. R21-138-42. Jones said that he discussed his concerns about the working conditions with Hansen, Randall, and Taylor. R21-138-39, 146-48. Former employee Larry Barwick said that he complained "to whoever would listen," including the LCP management, about the fumes[35] and visible mercury in the cell buildings.[36] R20-319-20. He refused to go into the

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[34] He noted that "the Swedish chlor-alkali industry . . . had air levels of 20 or below and urine levels which almost never exceeded 30" in 1990, demonstrating that such an environment was possible. P20-245. He explained that a safe environment could be promoted by the use of industrial hygiene, including "engineering controls, protective equipment, substitution of materials in places where you can substitute, and administrative controls as to how long and what kind of environments people work in." *Id.* at 246.

[35] Barwick said that:

> [T]he fumes from the acid burners were coming down and you couldn't breathe without wearing a respirator.
>
> It would burn your skin, it would take the hair off of your arms. It would get in your eyes, under your goggles. And everything-it had caustic. It had bleach. It had acid fumes . . . After probably the last year or year and a half, that was probably a regular everyday thing almost, that you would get gas somewhere in [the cell building]. P20-319-20.

[36] Barwick testified that the mercury "was everywhere . . . the floors, the ledges, the beams, any place you had to get up in to to change headers . . . You would have mercury on the beams. You would have mercury on

cellrooms, and was once sent home for the day based on his refusal. R20-321. The evidence, therefore, was sufficient to show that the defendants knew that the plant's violations of the CWA and RCRA violations were inevitable, that the plant was incapable of complying with environmental standards, and that the employees were endangered while working within this environment without consenting to the risk.

4. Conspiracy

Hansen, Randall, and Taylor argue that the district court erred by not granting their motions for acquittal because the government never proved a conspiracy. They maintain there was no showing of an agreement between them, the operation of the plant was a legal act, and they did not pursue the objectives of the conspiracy. Randall suggests that the evidence showed that he took affirmative steps to improve compliance. Taylor contends that he was not involved in the operations at the Brunswick plant for a significant period of the "conspiracy" and authored several memos to management expressing his concerns regarding the plant's operation once he began working there. He maintains that, after assuming the plant manager position, he recommended shutting down the plant or at least one of the cellrooms and, when those recommendations were rejected, he spent several months seeking money for maintenance. He also argues that the evidence showed that he directed that the reports be truthful and accurate.

To obtain a conviction under 18 U.S.C. § 371, "the government must show: '(1) the existence of an agreement to achieve an unlawful objective; (2) the defendant's knowing and voluntary participation in the conspiracy; and (3) the commission of an overt act in furtherance of the conspiracy.'"

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the floors. When you would take the headers apart, mercury would run out of them." R20-320.

United States v. Harmas, 974 F.2d 1262, 1267 (11th Cir. 1992) (quoting *United States v. Cure*, 804 F.2d 625, 628-30 (11th Cir. 1986)). "An agreement may be proved by either direct or circumstantial evidence and a common scheme or plan may be inferred from the conduct of the participants or from other circumstances." *United States v. Diaz*, 190 F.3d 1247, 1254 (11th Cir. 1999). However, it is "essential" "that the object of the agreement must be illegal." *United States v. Toler*, 144 F.3d 1423, 1426 (11th Cir. 1998). "Each party to a continuing conspiracy may be vicariously liable for substantive criminal offenses committed by a co-conspirator during the course and in the furtherance of the conspiracy, notwithstanding the party's non-participation in the offenses or lack of knowledge thereof." *United States v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996) (*citing Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 1184 (1946)). In the usual *Pinkerton* case, it is not necessary for the court to inquire into a particular conspirator's individual culpability, "so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy." *United States v. Alvarez*, 755 F.2d 830, 849-50 (11th Cir. 1985). It is unnecessary for the government to prove that each conspirator participated in all aspects of a conspiracy, knew each phase or every detail of the conspiracy, or knew all of the participants. *United States v. Pedrick*, 181 F.3d 1264, 1272 (11th Cir. 1999). A conspirator may be convicted if he "participates in some affirmative conduct designed to aid the success of the venture with knowledge that h[is] actions would further the venture." *Id.* A defendant may be convicted of conspiracy if he joined the conspiracy after its inception and played only a minor role within it, *United States v. Knowles*, 66 F.3d 1146, 1155 (11th Cir. 1995), and he is presumed to be a part of the conspiracy until all conspiracy activity ceases or he proves that he withdrew. *United States v. LeQuire*, 943 F.2d 1554, 1563-64 (11th Cir. 1991). To show withdrawal, a conspirator must show that he

"has taken affirmative steps to defeat the objectives of the conspiracy," and "made a reasonable effort to communicate these acts to his co-conspirators or disclosed the scheme to law enforcement officers." *Id.* at 1564.

The indictment charged that, from July 1985 to 1 February 1994, Hansen, Randall, and Taylor "did knowingly and willfully combine, conspire, confederate and agree together and with others" to knowingly act in violation of the environmental laws by "continu[ing] to operate the Brunswick facility" after learning that they were in violation, storing and disposing of hazardous wastes without a permit, and submitting "incomplete, inaccurate, and misleading information" in their reports to the various state and federal regulatory agencies. R1-1-10-14. The evidence showed that the defendants admitting to sharing the common goal to operate the plant until a buyer could be found. The jury could infer from this goal and the defendants' knowledge of the plant's continuing problems with worker safety and environmental compliance that they reached a tacit agreement to operate the plant in violation of environmental laws. The defendants knew of the violations from either personal observation or from information that they received from the plant employees, and frequently communicated with each other regarding operation of the plant despite the continuous environmental concerns. The defendants failed to provide the corporate board with information about the violations, and failed to accurately present the plant's inability to comply with the regulations to the Georgia EPD. Each of the substantive offenses were foreseeable consequences of the agreement to continue operating the plant in violation of the environmental statutes.

5. Knowledge of the Substantive Offenses

Randall argues that the district court erred in denying his motion for acquittal because the government failed to show

that he had the requisite "knowledge" of the CWA and RCRA violations on the specific dates when they occurred. He contends that his knowledge after the violations had occurred was not sufficient. The statutes for the violations under which Randall was indicted contain explicit knowledge requirements. For a conviction under 33 U.S.C. § 131 9(d)(2)(A), the defendant must be shown to have "knowingly" violated various sections of the CWA or permit conditions or limitations. For a conviction under 42 U.S.C. § 6928(d)(2)(A), the defendant must be shown to have "knowingly" treated, stored, or disposed of an identified hazardous waste without a permit. We have held that the knowledge element is satisfied where a defendant, who may not have "directly" caused a hazardous waste violation but had "approved of previous dumpings as a way to meet storage squeezes," "effectively ordered" a subsequent violation when he instructed a subordinate to "handle" hazardous waste. *United States v. Greer*, 850 F.2d 1447, 1451-52 (11th Cir. 1988).

Here, although Randall did not directly cause the violations, he knew that the plant was violating its permit on an almost daily basis, accumulating wastes that it could not treat, and was frequently releasing the wastes from the cellrooms as needed to keep the plant operational. He received 22 written reports between 3 August 1993 and 4 February 1994 advising him of a total of 110 different violations of the NPDES permit. He received frequent and sometimes daily oral and written reports from the various plant managers of the plant's operations and safety concerns. He knew that the plant was incapable of complying with the environmental standards and knew that the violations were inevitable. We conclude that the evidence that Randall permitted the plant employees to process the hazardous wastes as they had in the past despite his knowledge that the procedures were in violation of environmental regulations was sufficient to show that Randall acted "knowingly."

C. Jury Instructions

Hansen, Randall, and Taylor argue that the district court's jury instructions misstated the reasonable doubt standard, improperly applied the concept of responsible corporate officer, improperly defined the elements of knowing endangerment, and effectively eliminated the mens rea requirement from each of these statutory violations. Hansen contends that the instructions essentially instructed the jury that they could convict him because of his job title.

" 'We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party.'" *United States v. Grigsby*, 111 F.3d 806, 814 (11th Cir. 1997), quoting *United States v. Chandler*, 996 F.2d 1073, 1085 (11th Cir. 1993). We review the district court's denial of a requested instruction for abuse of discretion, because a defendant is entitled to an instruction on a defense theory if it has some basis in the evidence and is supported by law. *Grigsby*, 111 F.3d at 814. A defendant cannot challenge a jury instruction on a ground not raised at trial unless he establishes "plain error" under Fed.R.Crim.P.52(b). *United States v. Meester*, 762 F.2d 867, 879-80 (11th Cir. 1985). If the requirements of Rule 52(b) are satisfied and the instruction was made in error, is plain, and affected substantial rights, we "may then exercise [our] discretion to notice a forfeited error, . . . only if the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 466-68, 117 5. Ct. 1544, 1548-49 (1997) (internal citations omitted). Under the invited error doctrine, we will generally not review an error induced or invited by a party through the submission of an incorrect jury instruction to the judge which passed on to the jury. *United States v. Stone*, 139 F.3d 822, 838 (11th Cir. 1998) (per curiam).

1. Reasonable Doubt Standard

Hansen and Randall maintain that the district judge misstated the essential basis of the convictions by instructing that the government did not have to prove guilt beyond a reasonable doubt. In his introduction to the jury instructions, the district judge advised the jury that he would read them the jury charge and would provide them each a copy of the charge for them to "refer to it at any time you think is appropriate" when they were sent out to deliberate. R22-172. The district judge then orally instructed the jury on reasonable doubt as follows:

> So the Government always has the burden of proving a Defendant guilty beyond a reasonable doubt. If it fails to do so, under your oath, you would have to find that Defendant not guilty.
>
> *But while the Government 's burden is a heavy burden, it is not necessary that the Defendant's guilt be proved beyond a reasonable doubt, because that is generally impossible. The law does not require a mathematical certainty, only the exclusion of any reasonable doubt concerning that Defendant's guilt.*
>
> In that regard, a "reasonable doubt" is defined as a real doubt, based upon reason and common sense after a careful and impartial consideration of the entire evidence in this case, or the lack of evidence.
>
> Proof beyond a reasonable doubt, in other words, is proof of such a convincing character that you would be willing to rely or act upon it without hesitation in a decision involving the most important of your affairs. But you take a common sense view. . . .
>
> You may not find a Defendant guilty unless you find that the inferences you draw from the evidence are consistent with the theory of his guilt and inconsistent

> with reasonable theories of innocence. If you are convinced that a Defendant has been proved guilty beyond a reasonable doubt, say so with a verdict of guilty. On the contrary, if you have reasonable doubt, then under your oath, you would have to find that Defendant not guilty.

R22-174-75 (emphasis added). No objection was made as to this instruction. R22-206-O9.[37]

The passage, as provided to the jury in the written charge, read:

> Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning a Defendant's guilt.

R6-133-2.

"[W]e consider [a reasonable doubt] instruction as a whole to determine if the instruction misleads the jury as to the government's burden of proof." *Harvell v. Nagle*, 58 F.3d 1541, 1542 (11th Cir. 1995). The jury must be instructed that defendant's guilt must be proved by the government "beyond a reasonable doubt" on each element of the charged offense,

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[37] The government argues that there may be an error in the transcript. Government brief at 23. There is no indication that this matter was submitted to and settled by the district court consistent with the procedure outlined in Fed.R.App.P. 10(e).

The district judge provided the parties with an opportunity to "[s]tate [their] exceptions" after the jury instructions were read. R22-206-09. Taylor's counsel said he had been "listening carefully to the charge" and had heard the word "water" used in the place of "wastes." *Id.* at 208. He then noted that the jury "will have it to read." *Id.* Taylor's counsel also observed that the word "person" had been defined as an "individual corporate officer" instead of a "responsible corporate officer;" the judge made a curative instruction. *Id.* at 208-09.

but the trial court is not required to define reasonable doubt. *Id.* If the trial court defines reasonable doubt, the standard must be explained correctly. *Id.* A district court's failure to submit an element of the offense to the jury, including an erroneous instruction on reasonable doubt, is a structural error which defies the harmless-error analysis. *Johnson*, 520 U.S. at 468-69, 117 S. Ct. 1544 at 1549-50. Although we have held that "an inadequate reasonable doubt instruction cannot be cured by other circumstances at trial," *Nutter v. White*, 39 F.3d 1154, 1158 (11th Cir. 1994) (reversing a conviction in which the instruction defined reasonable doubt using the phrase "substantial doubt"), "[j]ury instructions are not considered in isolation; rather we view them in the context of the entire... proceeding." *Waters v. Thomas*, 46 F.3d 1506, 1524 (11th Cir. 1995).

Here, the improper passage is immediately prefaced and followed by a correct instruction, and the correct instruction was included in the written copy provided to each juror. The judge stated the correct instruction numerous times, including each element of each offense to be proven. *See* R22-172, 173, 182, 185, 187, 189, 193-94, 199-201. The instruction, as written and as provided to the jury, was not inadequate and presented the correct reasonable doubt standard. Viewing this instruction as a whole and in the context of the entire proceeding, we find that it did not mislead the jury as to the reasonable doubt standard. *See United States v. Torres*, 901 F.2d 205, 243 (2nd Cir. 1990) (rejecting a challenge to the language used in one sentence of a reasonable doubt standard where a correct instruction was provided "immediately after" the challenged language and provided at least five times in the instructions in general and as to the specific offenses); *but see Bloomer v. United States*, 162 F.3d 187, 189, 194 (2nd Cir. 1998) (finding an improper reasonable doubt instruction constitutionally deficient despite at least 17 proper instructions where there was no curative instruction to alert the jury to disregard the incorrect instruction.)

2. Reasonable Corporate Officer

Hansen and Randall contend that the district judge undermined the jury's fact-finding function by directing that they treat the defendants as "responsible corporate officers" ("RCO"). They maintain that the instruction as given permitted the jury to convict them on the basis of their corporate positions instead of their individual liability. They suggest that the district court's separate RCO instruction allowed the jury to believe that it applied equally to the conspiracy, CWA and RCRA charges.

The district judge instructed the jury:

> Under the federal Clean Water Act, the definition of a "person" specifically includes corporations and individual corporate officers. You are instructed that the Defendants, Christian Hansen, Randall Hansen, and Alfred Taylor are persons for purposes of the Clean Water Act.

R22-191. Taylor's attorney objected that "[t]he statute says, '. . . and responsible corporate officers.'" R22-209. The district judge then explained "[w]herever I have used the term 'corporate officers,' I mean responsible corporate officers." *Id.*

In a CWA case, "the term 'person' means . . . any responsible corporate officer." 33 U.S.C. § 1319(c)(6). The RCRA counts require proof that each defendant "knew" of the violations' potential for harm and danger. 42 U.S.C. § 6928(e). In *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991), the First Circuit vacated a conviction under 42 U.S.C. § 6928(d)(1) after finding that the district court's instruction, which relied on the RCO doctrine in part and which instructed "that the officer must have known or believed that the illegal activity of the type alleged occurred" incorrectly permitted a finding of guilt without a determination that the defendant possessed actual

knowledge of the specific violation. *Id.* at 51. The First Circuit reasoned that the RCO doctrine was inapplicable where the defendant was charged under a statute that required explicit knowledge. *Id.* 51-55. The Ninth Circuit has held that:

> [U]nder the CWA, a person is a 'responsible corporate officer' if the person has authority to exercise control over the corporation's activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.

United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998). Explaining that "[t]he relevant inquiry is whether the instructions *as a whole* are misleading or inadequate," the Ninth Circuit rejected the defendant's argument that the RCO "instruction allowed the jury to convict him without finding a violation of the CWA." *Id.* at 1026. The district judge had stated the elements needed for the government's proof and told the jury that the CWA "'also holds accountable'" RCOs. *Id.* The Ninth Circuit found the instructions not erroneous, reasoning that "the [RCO] instruction relieved the government *only* of having to prove that defendant *personally* discharged or caused the discharge of a pollutant" and that "[t]he government still had to prove that the discharges violated the law and that defendant knew that the discharges were pollutants." *Id.* We find this issue meritless. The clarifying instruction given by the district court was requested by the defendants. The district court's instruction on responsible corporate officer was not given as to the CWA counts, Counts 2-21, but was given only as to Counts 22-34.

3. Knowing Endangerment

Hansen argues that the instructions authorized the jury to convict him of knowing endangerment without making a

determination that he knew of an imminent danger. Hansen requested that the instruction include the "element of knowingly" on "each element of the offense" to insure that the jury understood that the charges were related to "individual, personal, knowing, knowledgeable, deliberate conduct." R22-53-55. The district judge noted that the preface to the instructions included "knowingly" and agreed that he would add an instruction that "[t]he term knowingly is applicable to each element of the offense." *Id.* at 54, 56. Hansen's attorney responded "[t]hat would help, Judge." *Id.* at 56. Later, the government requested that the instructions for "willful" be limited to count 1 and that the instructions for "knowingly" apply to the remaining counts. *Id.* at 70-71. Hansen's attorney stated that he "strongly disagree[d]," but the judge indicated that he would permit the instruction, as clarified, to stand. *Id.* at 71. At the end of the charge conference, Hansen's attorney renewed his objection to the district judge's failure to give the knowing instruction as to each offense. *Id.* at 206-07. Because the instruction required that the jury find that Hansen knew that the violations could cause imminent danger, this argument is meritless.

4. Mens Rea Requirement

Hansen argues that the instructions permitted the jury to convict him of the RCRA violations without making factual findings that he had knowledge of the RCRA elements of hazardous materials, permit regulations, and the treatment, storage, or disposal of hazardous wastes. He maintains that the instruction reinforced the government's position that Hansen should be convicted because LCP was his company, and not based on the legally required relationship between Hansen and the violations. During the charge conference, Randall's attorney objected to an instruction as to Counts 22-34, arguing that it should be limited to Counts 22-33, because Count 34 had additional elements. R22-59-63, 65-66. He asked that an instruction be added limiting liability to

knowledge possessed by the defendant himself, and the district judge responded "[a]ll right. All right. We will add that.". *Id.* at 61.

During closing argument, the government stated:

> Chris Hansen is a hands-on manager. You heard discussions of how he ran the plant. I would submit it was probably his way or the highway. Does anybody doubt he would have known what was going on at every place in the plant? He was there. He ordered the Bunker C tanks to be filled.

R22-99-100. The district judge explained that:

> a person acts knowingly if he acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness. Whether a Defendant acted knowingly may be proven by the Defendant's conduct and by all of the facts and circumstances surrounding the case.

Id. at 188. Addressing the RCRA counts, the district judge instructed:

> Each count charges the . . . Defendants, all of them, unlawfully treated, stored, or disposed of one or more hazardous wastes without the required permits.
>
> Now in order to prove a Defendant guilty of those charges, the prosecution must establish the following essential elements:
>
> First, that on or about the date charged in Counts 22 through 34, the Defendant under consideration knowingly treated, stored, or disposed of one or more of the solid wastes listed in those counts;
>
> Next, that such solid wastes were listed or identified under RCRA as hazardous wastes; and

> Third, that the wastes were treated, stored or disposed of at a location which did not have either interim status or a RCRA permit authorizing the treatment, storage or disposal of such wastes.

Id. at 192. The district judge also charged that "the Government must prove beyond a reasonable doubt that the Defendant under consideration knew that substances involved in the alleged offenses had the potential to harm others or the environment." *Id.* at 193. The district judge continued:

> Now each Defendant may be found guilty of Counts 22 through 34 of the Indictment if you find that the Government has proven the following beyond a reasonable doubt:
>
> First, that the Defendant under consideration had a responsible relationship to the violation-that is, that it occurred under his area of authority and supervisory responsibility;
>
> Second, that the Defendant had the power or the capacity to prevent the violation; and
>
> Third, that the Defendant acted knowingly in failing to prevent, detect or correct the violation.

Id. at 200-01. Randall's counsel renewed the objection that the instruction as to Count 34 was erroneously included because it could not be based on constructive knowledge.

Id. at 207.

We have held that a defendant's "knowledge [as to whether a site has a permit or the disposal of hazardous waste] does not require certainty, and the jurors may draw inferences from all of the circumstances, including the existence of the regulatory scheme." *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1505 (11th Cir. 1986) (reviewing a conviction under 42 U.S.C. § 6928(d))(l)). As to Count 34, RCRA's knowing endangerment provision also requires proof

that the hazardous waste violation placed persons in "imminent danger of death or serious bodily injury" and that the defendant had knowledge of that danger. 42 U.S.C. § 6928(e). Because the instructions clearly set forth that a finding of "acted knowingly" was required for a conviction, there was no error in the instruction.

5. Wastewater Treatment System

Hansen contends that the instructions allowed the jury to convict him under the CERCLA release offenses without a finding that he knew the quantity of the materials released or was meaningfully in charge at the time of the release. Taylor argues that, because the instruction failed to include the definition of "tank," it allowed the jury to consider the cellroom as a part of the wastewater treatment system. In his request for a charge as to Counts 35 through 40, Hansen asked that the jury be instructed that it could not convict him unless he was the person in charge at the time of the release and knew that the released hazardous materials exceeded the applicable reportable quantity. R4-98, Request to Charge No. 23.[38]

The district judge instructed the jury:

> Now Counts 35 through 41 charge the Defendants, Mr. Christian Hansen and Mr. Taylor with violations of

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[38] Specifically, Hansen requested that the charge read:

> *First*, that on the date alleged in each respective count, Christian Hansen was a "person in charge of a facility," as that term is defined by law;
>
> . . .
>
> *Fourth*, that Mr. Hansen (1) knew that the described release had occurred, (2) knew that the wastewater released contained a reportable quantity of mercury, and (3) knew that the release was not allowed by any federal permit.

R4-98 at Charge 23.

the Comprehensive Environmental Response, Compensation, and Liability Act, which is known by the acronym CERCLA, which requires the immediate reporting of the release of a reportable quantity of a hazardous substance into the environment.

. . .

To establish a violation of this Act, as alleged in Counts 35 through 41, the Government must prove the following elements beyond a reasonable doubt as to each Defendant:

First, that the Defendant was one of the "persons in charge" of a facility;

With respect to Counts 35 to 40, that a reportable quantity of mercury contaminated wastewater-that is, more than one pound of wastewater contaminated with mercury and other hazardous substances-was released into the environment within a 24 hour period;

As to count 41, that a reportable quantity of chlorine-that is, in excess of 10 pounds-was released into the environment within a 24 hour period; and

That the Defendant under consideration failed to notify immediately the National Response Center of the release of such materials as soon as he had knowledge of the release.

CERCLA's reporting requirements are not extended to all employees involved in a release. The reporting requirements apply to any person-even if of relatively low rank-who was in a position to detect, prevent, and abate a release of the hazardous substances.

. . .

A "person in charge's" control over a facility need not be sole or exclusive. There may be several "persons in

> charge" of the same facility. It is only necessary that the individual have or share such control of the facility where the release occurred.

R22-201-02.

In clarifying the definition of "operator" under CERCLA, the Supreme Court instructs that "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility... specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 1887 (1998). The district court's instructions required that the jury find that the defendant under consideration knew of the release and knew that the release contained hazardous waste, and failed to report it.

There is no indication in the record that Taylor requested an instruction on the definition of "tank." Hansen requested an instruction on the existence of the wastewater treatment exemption to the 90-day labeling and disposal period.[39] R22-68-69. The judge subsequently included such an instruction:

> Tanks which are part of a wastewater treatment system that is subject to regulation under the CWA need not have a RCRA permit so long as they are used for the treatment of wastewater. Therefore, wastewater which

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[39] Hansen's counsel explained that he "just want[ed] the jury to understand that if the water is handled through the wastewater system, it's exempt from the ninety-day labeling and all these other things." R22-69. The government counsel responded: "If it's in a tank. It needs to be clear that if it's in a tank and it can be treated in a wastewater system-." *Id.* The district judge asked that the language be provided to him in writing, and Hansen's counsel agreed to do so. *Id.*

> is being held temporarily in such tanks is not subject to these RCRA permitting requirements.

Id. at 199.

A "tank" is defined by the regulations as "a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g. wood, concrete, steel, plastic) which provide structural support." 40 C.F.R. § 260.10. Although Taylor maintains that the instruction would have helped the jury understand that the cellroom was a tank and part of the wastewater system, the evidence showed that the berms, used in the cellroom to contain the wastewater, were constructed of dirt. R19-256. Taylor neither requested a definition of "tank" in the instructions nor was prejudiced by the failure to of the court to provide it.

D. *Sentencing Guidelines*

We review the district court's factual findings for clear error and its application of the law to those facts *de novo*. *United States v. Quinn*, 123 F.3d 1415, 1424 (11th Cir. 1997).

1. Downward Departure

a. Christian Hansen

Hansen argues that the district court erred by concluding that it lacked the authority to depart under U.S.S.G. § 5K2.0. He maintains that, at a minimum, the district court was ambiguous as to whether it believed that it had the authority to grant a downward departure and that any ambiguity must be resolved in his favor.[40]

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[40] Amicus curiae The Washington Legal Foundation also raises the issue that Hansen's sentence must be vacated because the environment sentencing laws were unlawfully promulgated and impose patently unreasonable sentences. However, this issue was not considered before the district court and will not be considered on appeal. *United States v.*

At sentencing, Hansen argued, *inter alia*, that he should be granted a downward departure pursuant to U.S.S.G. § 5K2.0 because the factors of the case took it outside of the heartland of cases to which the guidelines apply. R13-5-8. He argued that a departure was warranted because the government agencies monitored and knew of the environmental violations, and that this situation was not where Congress intended to impose the high penalties for environmental violations. *Id.* at 6. After sentencing Hansen, the district judge stated that he "d[id] not really find any actual basis for a departure from the guidelines, even though I might, if I had discretion, found otherwise." *Id.* at 52.

We "generally may not review the merits of a district court's refusal to grant a downward departure, [but] may conduct a *de novo* review of a defendant's claim that the district court mistakenly believed it lacked the authority to grant such a departure." *United States v. Mignott*, 184 F.3d 1288, 1290(11th Cir. 1999) (per curiam). Where the district court expresses ambivalence about its authority to depart from the guidelines, we review the record to determine the district court's understanding. *See United States v. Webb*, 139 F.3d 1390, 1394-95 (11th Cir. 1998) (noting that "our independent review of the sentencing transcript reveals that the sentencing judge, at the very least, was bewildered and ambivalent as to whether the guidelines authorized a downward departure" and that "on balance, . . . the record more strongly suggests that the court believed that it was not authorized to depart downward."). If there is no indication that the district court misapprehended its authority, "we assume that the sentencing court understood it had authority to depart downward." *United States v. Chase*, 174 F.3d 1193, 1195 (11th Cir. 1999).

Allegheny-Ludlum Indus., 517 F.2d 826, 840 n. 13 (5th Cir. 1975) (noting that it would not consider issues briefed by amicus curiae which were not raised in the district court).

Hansen was sentenced after Randall. During Randall's sentencing hearing, the district judge acknowledged his authority to depart. R9-9. Hansen's sentencing transcript shows that the district judge permitted extensive discussion of whether the circumstances of Hansen's case were outside the heartland of cases to which the guidelines had been applied, and that neither party argued that the district court lacked the authority to depart downward. There is nothing in the record that shows that the district court misapprehended its authority to depart downward. Therefore, we assume the sentencing court understood its discretionary authority to grant a downward departure but decided not to exercise that authority. *Id.* at 1195. Because the district court understood that it had the authority to depart, we are unable to review the district court's denial of Hansen's request for a downward departure.

b. Randall Hansen

Randall contends that the district court erred in not granting his requests for a downward departure under §§ 5K2.0 and under 5K2.1 1. As to a departure under § 5K2.0, he argues that his case fell outside the heartland of other environmental prosecutions and that he was at all times operating under the authority of the U.S. Bankruptcy Court and upon the advice of his environmental counsel. As to a departure under § 5K2.11, he maintains that the district court erred in concluding that financial factors were not a "perceived greater harm" which could trigger a departure and in not understanding that the record supported his belief that a greater environmental, as well as economic, harm would occur at the site and in the community if the plant failed to remain operational.[41]

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[41] Randall also argues that the sentencing guidelines, as applied to environmental crimes, are arbitrary and were unlawfully promulgated. Randall did not raise this issue at the sentencing hearing but addressed it

At Randall's sentencing, the district judge stated:

> [T]he Court acknowledges that it does have authority to depart from the guidelines pursuant to [§§ 5K2.0 and 5K.211] if it finds that the circumstances of this case warrant such a departure.[42]

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in a supplemental memorandum in aid of sentencing. R9-228-8. Randall's sentencing hearing initially commenced on 2 June 1999, and was continued on 1 July 1999. On 1 July 1999, the hearing was called to order at 10:01 AM, and recessed at 10:24 AM. The supplemental memorandum is not referenced at the sentencing hearing and was filed at 12:11 PM on 1 July 1999. Therefore, it does not appear that this was considered by the district court. Because the issue was not considered by the district court, it will not be considered by this court. *Fed. Deposit Ins. Corp. v. Verex Assurance Inc.*, 3 F.3d 391, 395 (11th Cir. 1993).

[42] It appears that, although the district judge did not find that the circumstances warranted a departure, he nonetheless considered Randall's arguments. During the hearing, the district judge continued:

> As to the Defendant's arguments concerning lesser harm, I'm not particularly impressed with that. For the Court to consider a departure under this section [§5K2.11], the Court would have to find either that the Defendant committed the crime in order to avoid perceived greater harm or that the Defendant's conduct does not cause or threaten the harm or evil sought to be prevented by the laws prohibiting the offenses at issue.
>
> Now as to that first prong, the Defendant has failed to produce evidence, other than his own statement, that closing the LCP plant would have caused a greater harm than allowing it to continue operating in the unsafe manner. His argument, as I understood it, is based upon financial reasons. As I recall, he stated that there was compelling societal interest in keeping the plant open and its three hundred employees working.
>
> While sympathetic to the plight of the employees who would have, and eventually did, lose their jobs, that does not, and I do not believe that it justifies subjecting the employees and the community to the risk of operating an unsafe chlor-alkali plant.

R9-9. He set forth the requirements for a departure under the guidelines, but found that no departure was warranted under either provision.

We may not review a district court's refusal to grant a downward departure unless the court mistakenly believed that it lacked the authority to grant such a departure. *Mignott*, 184 F.3d at 1290. Despite Randall's argument to the contrary, the

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> The Court finds that financial factors are not a perceived greater harm. And, therefore, no downward departure is warranted in that instance.
>
> As to the second prong, the guidelines permit a downward departure where the conduct may not cause or threaten the harm or evil sought to be prevented by the law prescribing the offense at issue.
>
> The environmental laws for which the Defendant was convicted were enacted to protect human life in the environment. Therefore, the Defendant's conduct was the type of conduct which the environmental laws sought to prevent. And as such, the Court finds that the circumstances of this offense do not warrant a downward departure under 5K2.11 of the guidelines.

R14-9-11.

As to the request for a departure under § 5K2.0, he stated:

> [I]n order for the Court to find that the Defendant's case falls outside the heartland, the Court has to find that this is an unusual case where there is something atypical about the Defendant or the circumstances surrounding the commission of the crime. I simply cannot make such a finding.
>
> I find that the circumstances of these offenses are those contemplated by the Sentencing Commission in the formulation of the guidelines. And farther, I find that there are no factors which take this case outside the heartland of the environmental guidelines. Accordingly, the Court finds that no departure is warranted under 5K2.0 of the guidelines.

Id. at 11.

district judge indicated his understanding that financial factors could be a "perceived greater harm" by weighing the harms associated with closing the plant and putting 300 employees out of work against keeping the plant open as an unsafe chlor-alkali plant and keeping the employees working, but found that the financial factors were not a harm greater than the harms associated with the operation of an unsafe chlor-alkali plant. R14-9-11. Because the district court acknowledged that it had the authority to depart, we lack the jurisdiction to review the decision.

c. Taylor

Taylor also argues that the district court erred by not granting him a downward departure under §§ 5K2.0 and 5K2.11. As to the request for a departure under § 5K2.0, he maintains that his case fell outside the heartland of environmental cases. As to the request for a departure under § 5R2.11, he contends that he believed that closing the plant would cause a greater environmental harm that continuing operations.

Taylor presented each of his issues at sentencing.[43] R12-20-21. The district judge asked the probation officer to comment on Taylor's requests for a departure, and to specifically address Taylor's cooperation during the cleanup efforts. *Id.* at 21-22. The probation officer responded that

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[43] Taylor adopted Hansen's arguments for a departure, but added that, as to the request for a departure under § 5K2. 11, that they had "prevented a greater harm from merely shutting down the plant without the proper decommissioning" based on their belief that "these problems, maintenance problems, could be addressed, the jobs could be saved, and the business could continue." R12-20-21. He "also call[ed] the Court's attention . . . to Mr. Taylor's conduct following the decommissioning of the plant." *Id.*

there were no grounds for a downward departure. [44] *Id.* at 41. The district judge commented:

> I am equally bound by the guidelines and by the law. And I do not have much discretion.
>
> . . .
>
> And I just cannot find a basis for departure under the guidelines, inasmuch as the facts as found are of the kind contemplated by the Sentencing Commission.

Id. at 42-43.

Because there is nothing in the record that indicates that the district court misapprehended its authority to depart downward, we assume that the district court understood its authority to depart and decided not to exercise its discretionary authority. Therefore, we lack jurisdiction to address the district court's decision not to depart.

III. CONCLUSION

After reviewing the record and carefully considering the briefs and oral argument, we conclude that the defendants' convictions are supported by the evidence, and that the district court did not err in the evidentiary rulings, the jury instructions, or at sentencing. Accordingly, we AFFIRM.

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[44] The probation officer noted that Taylor's cooperation should not be a factor since he was a contract, paid employee. *Id.* at 24. In response to Taylor's argument that "there's a lesser harm in keeping somebody employed than dumping hundreds of thousands of gallons of contaminated water into a marsh," he commented that "there was a tremendous amount of harm done to the environment. . . They're not looking at the effects. . . . [The] area was closed off by the Georgia Environmental Protection department because the fish and the seafood in there w[ere] contaminated. We will never know what damage this has all done." *Id.* At 40.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Oct. 26, 2001]

No. 99-11638-DD

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHRISTIAN A. HANSEN,
ALFRED R. TAYLOR,
RANDALL W. HANSEN,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19___, _____ F.2d _____).

Before: BIRCH and DUBINA, *Circuit Judges*, and HANCOCK*, *District Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Nov. 20, 2001]

No. 99-11638-DD

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHRISTIAN A. HANSEN,
ALFRED R. TAYLOR,
RANDALL W. HANSEN,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia

ORDER:

( ) The motion of Appellants, Randall and Christian Hansen, for (x) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant, Randall and Christian Hansen, for (x) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *January 24, 2002*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with

the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Appellant, Randall and Christian Hansen, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) *IT IS ORDERED* that the motion of Appellant, Randall and Christian Hansen, for a further stay of the issuance of the mandate is DENIED.

/s/ Stanley F. Birch
STANLEY F. BIRCH
UNITED STATES CIRCUIT JUDGE

ORD-45

APPENDIX D

Resource Conservation and Recovery Act
42 U.S.C. § 6928(d), (e), and (f)

(d) Criminal penalties

Any person who—

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. § 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. § 1411 *et seq.*]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such

activity took place before or takes place after November 8, 1984) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter—

(A) in knowing violation of any material condition or requirement of a permit under this subchapter; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a

violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph(1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

(f) Special rules

For the purposes of subsection (e) of this section—

(1) A person's state of mind is knowing with respect to—

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(A) an occupation, a business, or a profession; or

(B) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(5) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation,

company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(6) The term "serious bodily injury" means—

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Clean Water Act
33 U.S.C. § 1319(c)

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or

permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by

imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

Conspiracy
18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CRIMINAL ACTION NO. CR298-23

UNITED STATES OF AMERICA

v.

CHRISTIAN A. HANSEN,
RANDALL W. HANSEN,
and ALFRED R. TAYLOR

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished, you will go to the jury room and begin your discussions—what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find each Defendant under consideration guilty of the crimes charged in the Indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial. You must not be influenced in any way either by sympathy or prejudice for or against any of the Defendants or the Government.

You must also follow the law as I explain it to you, whether you agree with that law or not. You must follow all of my instructions as a whole. You may not single out, or disregard, any of my instructions to you on the law.

The Indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or produce any evidence at all. If a Defendant elects not to testify, you should not consider that in any way during your deliberations. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find that particular Defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning a Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense, after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

You may not find a Defendant guilty unless you find that the inferences you draw from the evidence are consistent with the theory of his guilt and inconsistent with reasonable theories of his innocence. If you are convinced that a Defendant has been proved guilty beyond a reasonable doubt, say so with a verdict of guilty. If you are not convinced, say so with a verdict of not guilty.

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the

record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

Also, you should not assume from anything that I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence, you may make deductions and reach conclusions which reason and common sense lead you to make, and you should not be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to

observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact, or whether there was evidence that, at some other time, a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial. If you find that a witness has testified falsely concerning any material matter, you have the right to distrust that witness's testimony concerning other matters.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

The testimony of some witnesses may be considered with more caution than the testimony of other witnesses. It is legitimate for the attorneys to attack or question the credibility of any witness on the ground that his or her testimony may be colored by a personal or professional interest in the case.

In this case, the Government called as one of its witnesses a person named as a co-Defendant in the Indictment. The fact

that a witness has pleaded guilty to the crime charged in the Indictment is not evidence, in and of itself, of the guilt of any other person. The Government has entered into a plea agreement with that witness, providing for the possibility of a lesser sentence than that to which he would otherwise be exposed. Such "plea bargaining," as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court. However, a witness who hopes to gain more favorable treatment may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while witnesses of this kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses. You may apply similar reasoning to the testimony of witnesses who have been promised immunity from prosecution.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters. Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

There have been admitted in evidence certain exhibits variously referred to as schedules or summaries. Strictly speaking, the exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize.

Exhibits of this nature are permitted where they are based upon voluminous records or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such records and documents.

But you are reminded that it is the records, and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For this purpose, you are entitled to consider them.

The guilt of a Defendant in a criminal case may be proved without evidence that the Defendant personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for one's self may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee, or other associate of the Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other just as though the Defendant had personally engaged in such conduct.

A Defendant is responsible for acts he performs or causes to be performed on behalf of a corporation, just as though that act were performed on his own behalf.

However, a Defendant who is an officer, director, employee, or agent of a corporation is not criminally responsible for the illegal acts of another officer, director, employee, or agent performed on behalf of that corporation merely because of his status as an officer, director, employee, or agent of the corporation.

Before any Defendant can be held criminally responsible for the conduct of others it is necessary that the Defendant willfully associate in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or

aided and abetted the crime. You must find beyond a reasonable doubt that the Defendants were willful participants and not merely knowing spectators.

It is your duty to give separate, personal consideration to each individual Defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against another Defendant or Defendants. Each Defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, as well as any other evidence in the case which may be applicable to him.

At this time, I will explain the Indictment, which charges 42 separate offenses, called "Counts." I will not read it to you at length because you will be given a copy of the Indictment for reference during your deliberations.

As it is used in these instructions, the term "LCP plant" means LCP Chemical Company's chlor-alkali production facility in Brunswick, Georgia.

Conspiracy Charge

Count One of the Indictment charges that the Defendants, Christian Hansen, Randall W. Hansen, and Alfred R. Taylor, knowingly and willfully conspired together:

A. to knowingly discharge pollutants from the outfall weir of the LCP plant in violation of the NPDES permit—that is, to knowingly discharge mercury and chlorine in quantities that exceeded the limits contained in the permit, and to knowingly discharge waste-water that violated the pH parameters contained in the permit into Purvis Creek, all in violation of the Clean Water Act;

B. to knowingly dispose of and store hazardous wastes without a RCRA permit; that is, to dispose of waste

mercury, mercury contaminated brine muds, mercury contaminated wastewater, caustic wastewater, mercury contaminated residue from caustic filter backwash, mercury contaminated solids, and wastewater treatment sludge into and on the land without a permit and also to store such wastes without a permit at various locations at the LCP plant, all in violation of the Resource Conservation and Recovery Act, or RCRA;

C. to knowingly endanger other persons through the unpermitted treatment, storage, and disposal of hazardous wastes; to knowingly fail to notify immediately the appropriate regulatory authorities upon receiving knowledge of the release of a reportable quantity of a hazardous substance, including chlorine gas, sodium hypochlorite bleach, mercury contaminated wastewater, and caustic wastewater with a pH value of 12.5 or greater, into the environment, all in violation of the Comprehensive Environment Response, Compensation, and Liability Act, or CERCLA; and

D. to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the EPA and the United States Occupational Safety and Health Administration (OSHA).

Title 18, United States Code, Section 371, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of partnership in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense, it is not necessary for the Government to prove that all of the people named in the Indictment were members of the scheme, or that those who were members had entered into any formal type of agreement, or that the members had planned together all of

the details of the scheme or the "overt acts" that the Indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself, followed by the commission of any overt act, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the Indictment;

Second: that the Defendants, knowing the unlawful purpose of the plan and intending to further its accomplishments willfully joined in it;

Third: that one of the conspirators, during the existence of the conspiracy, knowingly committed at least one of the overt acts described in the Indictment; and

Fourth: that such overt act was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

If a Defendant enters into a conspiracy agreement but later has a change of mind and withdraws from that agreement before anyone has committed an overt act, as previously

defined, then the crime was not complete at that time and the Defendant who withdrew cannot be convicted. That Defendant would be not guilty of the alleged conspiracy offense.

However, in order for you to decide that a Defendant withdrew from a conspiracy, you must find that the Defendant took affirmative action to disavow or defeat the purpose of the conspiracy. As just explained, the Defendant must have taken such action before any member of the scheme had committed any overt act.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if you find that a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on even one occasion, you may convict that Defendant for conspiracy even though that Defendant did not participate before, and even though that Defendant played only a minor part.

A Defendant who has been found guilty of conspiracy may then be found guilty for reasonably foreseeable acts or offenses committed by co-conspirators during the time that the Defendant under consideration was a knowing, willful member of the conspiracy.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator. To convict a Defendant for conspiracy, you must be convinced beyond a reasonable doubt that the Defendant intended to accomplish the unlawful purpose of the conspiracy.

With respect to the conspiracy count, the term "willfully" means voluntarily and purposely, with specific intent or purpose to do something that the law forbids. You may consider the evidence of a Defendant's acts and words, along with all the other evidence, in deciding whether a Defendant acted willfully.

With respect to the remaining counts, the Government must prove that each Defendant under consideration acted knowingly. A person acts knowingly if he acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness. Whether a Defendant acted knowingly may be proven by the Defendant's conduct and by all of the facts and circumstances surrounding the case.

It is not necessary for the Government to prove that a Defendant knew that a particular act or failure to act was a violation of law or that a Defendant had any specific knowledge of the particular regulatory limits imposed under the Clean Water Act (CWA), or the Comprehensive Environmental Response Compensation and Lability Act (CERCLA), or the Resource Conservation and Recovery Act (RCRA).

With regard to the conspiracy alleged in this case, the Indictment charges that the Defendants conspired to commit numerous separate, substantive crimes or offenses.

In such a case, it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit all of those substantive offenses. It is sufficient for conspiracy if the Government proves, beyond a reasonable doubt, that the Defendant under consideration willfully conspired with someone to commit *one* of those offenses. But, in that event, in order to return a verdict of guilty on the conspiracy count, you must unanimously agree upon which of the offenses the Defendant conspired to commit.

Clean Water Act Charge

Counts 2 through 21 of the Indictment charge the Defendants with violations of the Clean Water Act, Title 33, United States Code, Section 1319(c)(2). Section 1319(c)(2) provides that any person who knowingly violates any permit condition or limitation, in a permit issued pursuant to the National Pollutant Discharge Elimination System, or "NPDES," is guilty of an offense against the United States.

In other words, any person who knowingly discharges pollutants in violation of the conditions or in excess of the limits of a NPDES permit has committed an offense against the United States.

In order to prove a Defendant guilty of violating the Clean Water Act as charged in Counts 2 through 21, the Government must establish the following elements:

(1) that on or about the date set forth in the Indictment, the Defendant under consideration knowingly:

(2) violated, or caused to be violated, a permit condition

(3) set forth in a NPDES permit:

A. For counts 2 through 9, that mercury in excess of the daily average discharge limit allowed by the permit was discharged.

B. For counts 10 through 15, that mercury in excess of the daily maximum discharge limit allowed by the permit was discharged.

C. For counts 16 through 21, that chlorine in excess of the daily maximum discharge limit allowed by the permit was discharged.

The term "knowingly," as I stated, is applicable to each element of the offense. The term "discharge of a pollutant" is

defined in the Clean Water Act as any addition of any pollutant from any point source to navigable waters of the United States.

The law provides that the term "pollutant" includes solid waste, chemical wastes, and industrial waste discharged into waters of the United States.

The term "point source" is defined in the Clean Water Act to mean any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure or container . . . from which pollutants are or may be discharged."

The term "waters of the United States" includes:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; and
2. All other waters including any such waters from which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
3. Wetlands adjacent to waters otherwise identified as waters of the United States.

Under the federal Clean Water Act, the definition of "person" specifically includes corporations and individual corporate officers. You are instructed that the Defendants, Christian A. Hansen, Randall W. Hansen, and Alfred R. Taylor are persons for purposes of the Clean Water Act.

Resource Conservation and Recovery Act Charge

Counts 22 through 34 of the Indictment charge the Defendants with violating the Resource Conservation and Recovery Act (RCRA), Title 42, United States Code, the federal statute which regulates the treatment, storage, and disposal of hazardous wastes. Alfred R. Taylor is not charged with Count 33. Each count charges that the Defendants

unlawfully treated, stored, or disposed of one or more hazardous wastes without the required permits. In order to prove a Defendant guilty of these charges, the prosecution must establish the following essential elements:

First: that on or about the date charged in Counts 22 through 34, the Defendant under consideration knowingly treated, stored, or disposed of one or more of the solid wastes listed in those counts;

Second: that such solid wastes were listed or identified under RCRA as hazardous wastes; and

Third: that the wastes were treated, stored or disposed of at a location which did not have either interim status or a RCRA permit authorizing the treatment, storage, or disposal of such wastes:

A. For Counts 22 and 23, by placing hazardous wastes on the floor of Cellroom #1 at the LCP plant, which had holes and cracks such that the wastes flowed onto the land and into the groundwater.

B. For Counts 24 and 25, by placing hazardous wastes on the floor of Cellroom #2 at the LCP plant.

C. For Counts 26 through 32, by causing hazardous wastes to flow out of Cellroom #2 at the LCP plant and onto the land near the southwest corner of that building.

D. For Count 33, by storing hazardous wastes in tanks in Bunker C at the LCP plant. (The Defendant, Alfred Taylor, is not charged with Count 33).

E. For Count 34, by treating, storing, and disposing of hazardous wastes at the LCP plant while knowing that such conduct placed Hanlin employees and other persons in imminent danger of death or serious bodily injury.

In order for you to find a Defendant guilty of Counts 22 through 34, the Government must initially prove that such Defendant under consideration knowingly treated, stored, or disposed of at least one hazardous waste listed in that Count of the Indictment, at a facility which did not have either a permit or interim status.

A person who submits a Part A RCRA permit application has interim status, which means he can operate the unit listed on the Part A application until such time as a final permit is issued.

The Government must prove beyond a reasonable doubt that the Defendant under consideration knew that substances involved in the alleged offenses had the potential to harm others or the environment. However, the Government need not establish that such Defendant knew that those chemicals were, or identified by law as, hazardous waste or that such Defendant knew that he was required to obtain a permit before treating, storing or disposing of the substances. It is not necessary for the Government to prove that the Defendant under consideration knew a particular act or failure to act was a violation of law or that such Defendant acted with any federal law in mind.

The term "imminent danger" as it is used in these instructions means danger that is substantially certain to occur. Thus, the burden is on the Government to establish beyond a reasonable doubt that the Defendant under consideration created a danger which made it substantially certain that another person would suffer serious bodily injury or death. A

mere possibility that someone would suffer serious bodily injury or death is not enough.

The Government is not required to establish that the Defendant under consideration intended or desired any harm to another person. However, in addition to finding that such Defendant placed another person in imminent danger of death or serious bodily injury, you must also find that the Defendant was actually aware or actually believed that his conduct was substantially certain to cause danger of death or serious bodily injury. A Defendant is only responsible for his own actual awareness or actual belief. Another person's knowledge of the danger or knowledge that the Defendant should have had or could have had under other circumstances does not suffice and cannot be attributed to the Defendant under consideration. The Defendant may not, however, affirmatively shield himself from knowledge. You may treat such deliberate avoidance of positive knowledge as the equivalent of knowledge.

It is not necessary for the Government to prove that death or serious bodily injury actually occurred. The Government must prove only that the Defendant under consideration knew that his actions were substantially certain to place someone in imminent danger of death or serious bodily injury by creating a condition which could reasonably be expected to cause death or serious physical harm. While the danger must be an immediate result of the conduct, the existing danger may involve a harm which may not ultimately ripen into death or serious bodily injury for a long time, if at all.

RCRA provides specific standards and terms that must be employed in determining whether a Defendant knowingly endangered any person. The statute provides that a Defendant:

First: knows of his conduct, if he is aware of the nature of conduct;

Second: knows of an existing circumstance, if he is aware or believes that the circumstance exists; or

Third: knows of a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

RCRA provides that the term "serious bodily injury" means:

A. bodily injury which involves a substantial risk of death;

B. unconsciousness;

C. extreme physical pain;

D. protracted and obvious disfigurement; or

E. protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Regarding Count 34, if you find by a preponderance of the evidence, that is, if you find it more likely than not, that the persons endangered were employees of the LCP plant, that they consented to the conduct of the Defendant under consideration and that the danger was a reasonably foreseeable hazard of working at the LCP plant, you may not find the Defendant under consideration guilty of endangerment.

The term "hazardous waste," as used in RCRA, includes any refuse and other discarded, abandoned, or disposed of material resulting from industrial, commercial operations, which EPA and the State of Georgia have identified or listed is a hazardous waste.

A "solid waste" 'is any garbage, refuse, sludge, or any other waste material including oil, liquid, semi-solid, or contained gaseous material, that:

A. is discarded, abandoned or disposed of; or

B. is being accumulated, stored, or physically, chemically or biologically treated before being discarded; or

C. has served its original intended use and is sometimes discarded.

A material is "discarded" if it is:

A. disposed of;

B. burned or incinerated after having served its original intended use; or

C. physically, chemically, or biologically treated in lieu of or before being disposed of.

The term "disposal" as used in Counts 22, 23, and 26 through 32 of the Indictment means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on any land or water so that such hazardous waste or any part thereof may enter the environment or be emitted into the air, or discharged into any water, including ground waters.

However, the Government is not required to establish that the waste in question actually entered the environment, was emitted into the air, or discharged into water. It is sufficient for the Government to prove that the hazardous waste was placed into or on land in such a manner that it *could* enter the environment, air, or water, including ground water.

The term "storage" as used in the Indictment means the containment of hazardous waste, either on a temporary basis or for a period of time, in such a manner as not to constitute

disposal of such hazardous waste, at the end of which period the hazardous waste is to be treated, disposed of, or stored elsewhere.

The term "treatment," as used in the Indictment, means any method, technique, or process, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, render the waste nonhazardous or less hazardous, or to make the waste safer to transport, store, or dispose of, or to make the waste more amenable for recovery or storage.

The term "generator" means any person whose act or process at a particular site produces hazardous waste. A generator may not store hazardous waste for longer than 90 days without a hazardous waste storage permit.

A generator of hazardous waste may accumulate waste on-site for 90 days or less without a permit if they meet these conditions:

First: the waste must be placed in containers (like drums or tanks) that are in good condition;

Second: incompatible wastes which might react dangerously with one another are not mixed;

Third: each container must have the date when accumulation began clearly marked on it;

Fourth: each container must be clearly labeled hazardous waste; and

Fifth: the facility must train its personnel and must maintain a contingency plan for operating in the event of an emergency.

Tanks which are part of a wastewater treatment system that is subject to regulation under the CWA need not have a RCRA permit so long as they are used for the treatment of

wastewater. Therefore, wastewater, which is being held temporarily in such tanks, is not subject to these RCRA permitting requirements.

If the Government proves beyond a reasonable doubt that a Defendant:

First: is a generator who knowingly stored hazardous waste without a permit for longer than 90 days; or

Second: knowingly failed to comply with any one of these conditions, then the storage at the facility is in violation of RCRA.

You are instructed that the following wastes are listed as hazardous wastes under the Resource Conservation and Recovery Act:

K106: Wastewater treatment sludge from the mercury cell process in chlorine production.

K071: Brine purification muds from the mercury cell process in chlorine production, where separately prepurified brine is not used.

U151: Mercury.

You are instructed that a solid waste, exhibits the characteristic of toxicity for mercury if, using the test methods set forth in the regulations, a representative sample of the waste contains mercury at a concentration of equal to or greater than 0.2 milligrams per liter.

Under the law, liquid wastes which are "corrosive" are identified as hazardous wastes. A liquid waste is considered to be corrosive if a representative sample of the waste is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5.

I instruct you that when a hazardous waste listed under the regulations is mixed with a solid waste, the resulting mixture

is a hazardous waste *if* the reason for the listing of the hazardous waste is that it is a toxic waste.

Each Defendant may be found guilty of Count 22 through 34 of the Indictment if you find that the Government has proven the following beyond a reasonable doubt:

First: that the Defendant under consideration had a responsible relationship to the violation—that is, that it occurred under his area of authority and supervisory responsibility;

Second: that the Defendant had the power or the capacity to prevent the violation; and

Third: that the Defendant acted knowingly in failing to prevent, detect or correct the violation.

Again, the Defendant, Alfred R. Taylor, is not charged with Count 33.

Comprehensive Environmental Response, Compensation, and Liability Act Charge

Counts 35 through 41 charge the Defendants, Christian A. Hansen and Alfred R. Taylor, with violations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which requires the immediate reporting of the release of a reportable quantity of a hazardous substance into the environment. Randall W. Hansen is not charged with these Counts. To establish a violation of this Act, as alleged in Counts 35 through 41, the Government must prove the following elements beyond a reasonable doubt as to each Defendant:

1. that the Defendant was one of the "persons in charge" of a facility;

2A. as to counts 35 to 40, that a reportable quantity of mercury contaminated wastewater; that is, more than one pound of wastewater contaminated with

mercury and other hazardous substances, was released into the environment within a 24 hour period;

2B. as to count 41, that a reportable quantity of chlorine; i.e., in excess of 10 pounds, was released into the environment within a 24 hour period; and

3. that the Defendant under consideration failed to notify immediately the National Response Center of the release as soon as he had knowledge of the release.

CERCLA's reporting requirements are not extended to all employees involved in a release. The reporting requirements of CERCLA apply to any person—even if of relatively low rank—who was in a position to detect, prevent, and abate a release of hazardous substances. The term "person-in-charge" is deliberately designed to cover supervisory personnel who have responsibility for a particular facility.

A "person in charge's" control over a facility need not be sole or exclusive. There may be several "persons in charge" of the same facility. It is only necessary that the individual have or share such control of the facility where the release occurred.

"Environment" means any land surface, subsurface layers, or surrounding air within the United States.

The term "facility" is defined to include:

A. Any building, structure, installation, equipment, pipe or pipeline, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

B. any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located.

The term "release" is defined to mean any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.

Conclusion

I caution you, members of the jury, that you are here to determine from the evidence in this case whether each Defendant is guilty or not guilty. The Defendants are on trial only for the specific offenses alleged in the Indictment.

A separate crime or offense is charged against one or more of the Defendants in each count of the Indictment. Each charge, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find any one or more of the Defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other Defendant.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted, the matter of punishment is for the Judge alone to determine later.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict, you must all agree. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over.

Remember that, in a very real way, you are judges—judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room, you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[EXPLAIN VERDICT FORM]

You will take the verdict form to the jury room and, when you have reached unanimous agreement, you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

[Filed Jan. 6, 1999]

CR 298-23

UNITED STATES OF AMERICA

v.

CHRISTIAN A. HANSEN
RANDALL W. HANSEN
ALFRED R. TAYLOR
D. BRENT HANSON

GOVERNMENT'S AMENDED REQUEST TO CHARGE

Now comes the United States of America, by and through Harry D. Dixon, Jr., United States Attorney for the Southern District of Georgia, and requests the Court charge the jury on the following subjects, * * * [Page 56:]

Intent—Responsible Individual Instruction—(RCRA)

GOVERNMENT'S REQUESTED INSTRUCTION NO. ____
INSTRUCTION NO. ____

As a manager of the Brunswick LCP facility, the defendants may be found guilty of Count 22 through 34 of the Indictment if you find that the government has proven each of the following beyond a reasonable doubt:

> *First*, that the defendant has a responsible relationship to the violation—that is, that it occurred under his area of authority and supervisory responsibility;

Second, that the defendant had the power or the capacity to prevent the violation; and

Third, that the defendant acted knowingly in failing to prevent, detect or correct the violation.

United States v. Park, 421 U.S. 658, 672 (1975); *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943); *United States v. Cattle King Packing Co.*, 793 F.2d 232, 240-41 (10th Cir.), *cert. denied*, 107 S. Ct. 573 (1986); *United States v. Frezzo Brothers, Inc.*, 602 F.2d 1123, 1130 n.11 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); Given in *United States v. Dee*, 912 F.2d 741 (D. Maryland), 912 F.2d 741 (4th Cir. 1990).

Supreme Court, U.S.
FILED
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Nos. 01-1104 and 01-1112

In the Supreme Court of the United States

RANDALL W. HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

CHRISTIAN A. HANSEN AND ALFRED R. TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury stated with sufficient clarity the scienter elements of the environmental crimes with which petitioners were charged.

2. Whether petitioners were properly convicted of environmental violations to which they had knowingly contributed, even though they did not remain in positions of supervisory authority at the time that certain of the violations occurred.

3. Whether petitioners were properly convicted of environmental violations to which they had knowingly contributed, despite the fact that the corporation for which petitioners worked had declared bankruptcy and was subject to certain constraints on discretionary spending.

4. Whether an agreement among employees of the same corporation to commit an offense against the United States can constitute a conspiracy punishable under 18 U.S.C. 371.

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In the Supreme Court of the United States

No. 01-1104

RANDALL W. HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 01-1112

CHRISTIAN A. HANSEN AND ALFRED R. TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (01-1112 Pet. App. 1a-76a) is reported at 262 F.3d 1217. The opinion of the district court (01-1112 Pet. App. 77a-117a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2001. A petition for rehearing was denied

on October 26, 2001 (01-1112 Pet. App. 118a-119a). The petitions for a writ of certiorari were filed on January 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, prohibits the discharge of any pollutant into waters of the United States, except in compliance with a permit issued pursuant to the Act. 33 U.S.C. 1311(a), 1342. The CWA establishes criminal penalties of up to three years' imprisonment for any person who "knowingly violates" that prohibition. 33 U.S.C. 1319(c)(2)(A).[1]

b. The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, regulates the generation, treatment, storage, transportation, and disposal of hazardous wastes. RCRA requires a person to obtain a permit in order to treat, store, or dispose of hazardous waste. 42 U.S.C. 6925 (1994 & Supp. V 1999). Any person who "knowingly treats, stores, or disposes of any hazardous waste" either without a permit or "in knowing violation of any material condition or requirement of such permit" is subject to up to five years' imprisonment. 42 U.S.C. 6928(d)(2). RCRA also contains a knowing endangerment provision, which authorizes imprisonment for up to 15 years for any person who (1) "knowingly * * * treats, stores, [or] disposes of * * * any hazardous waste" either without a permit or in violation of a permit; and (2) "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." 42 U.S.C. 6928(e).

---

[1] The CWA also establishes misdemeanor penalties for negligent violations. 33 U.S.C. 1319(c)(1).

c. Section 371 of Title 18 makes it a crime to "conspire * * * to commit any offense against the United States." 18 U.S.C. 371.

2. After a jury trial in the Southern District of Georgia, petitioners Randall W. Hansen, Christian A. Hansen, and Alfred R. Taylor were found guilty of numerous federal criminal environmental violations for their involvement in the operation of a chlor-alkali chemical plant in Brunswick, Georgia. See 01-1112 Pet. App. 15a-16a. The plant was owned and operated by LCP Chemicals (LCP), a division of Hanlin Group, Inc. (Hanlin). *Id.* at 78a. In July 1991, Hanlin filed for Chapter 11 bankruptcy, but it continued to operate the plant as the debtor-in-possession. *Id.* at 7a. Christian Hansen and his son, Randall Hansen, were Hanlin executives who oversaw management of the plant. *Id.* at 2a, 80a. From February 1993 until July 1993, Taylor was the plant manager, and he later worked in the plant as a project engineer. *Ibid.*

The district court described the conditions at the plant as "hellish" and "execrable." 01-1112 Pet. App. 83a, 103a. The plant's wastewater treatment system was grossly inadequate and often wholly inoperative. *Id.* at 79a. Contaminated wastewater containing mercury, chlorine, and caustic soda backed up in the plant, flooding areas where employees worked and forcing them to wade through the wastes or to walk on wooden catwalks built over the wastes. *Id.* at 78a-79a & n.2. As the toxic wastewater accumulated, it was stored on the floors of the plant, in railway tank cars, and in old oil storage tanks. *Id.* at 79a-80a. Wastes frequently overflowed from the plant onto adjacent land, creating a large pool of hazardous waste that came to be known as "Lake Mercury." *Ibid.* Petitioners knew about the conditions that had resulted from the decrepit condition

of the plant but did not correct the situation, see *id.* at 97a, because they wished to keep the plant in operation until a buyer could be found, *id.* at 51a.

Petitioners were found guilty of conspiring to violate environmental laws, in violation of 18 U.S.C. 371; knowingly causing the pollutant discharge limits in the plant's CWA permit to be exceeded, in violation of 33 U.S.C. 1319(c)(2)(A); knowingly causing unpermitted storage and disposal of hazardous wastes, in violation of RCRA, 42 U.S.C. 6928(d)(2)(A); and knowingly endangering others through their RCRA violations, 42 U.S.C. 6928(e). See 01-1112 Pet. App. 15a-16a, 77a. In addition, petitioners Christian Hansen and Taylor were found guilty of failing to report releases of hazardous substances, in violation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9603(b)(3). 01-1112 Pet. App. 16a. In total, petitioner Christian Hansen was found guilty on 41 counts, petitioner Randall Hansen was found guilty on 34 counts, and petitioner Taylor was found guilty on 20 counts. *Ibid.* The district court denied petitioners' post-verdict motions for judgments of acquittal. *Id.* at 77a-117a. Petitioners were sentenced to terms of imprisonment of 108 months, 46 months, and 78 months, respectively. *Id.* at 16a-17a.

3. The court of appeals affirmed. 01-1112 Pet. App. 1a-76a.

a. The court of appeals examined the evidence presented at trial and concluded that each petitioner bore sufficient responsibility for the charged violations to support his convictions under the charged environmental statutes. 01-1112 Pet. App. 26a-33a. Petitioner Christian Hansen contended that he was entitled to a judgment of acquittal with respect to all violations that had occurred either between April and July 1993 (after

he was deposed as Hanlin CEO and before he became plant manager) or after October 1993 (when he was replaced as plant manager). *Id.* at 27a-28a. The court of appeals rejected that contention, explaining that

> [t]he testimony at trial indicated that Hansen was aware that wastewater was permitted to flow out the cellroom back door in June 1993, and directed the use of the old Bunker C storage tanks for storage of wastewater, including the inadequately treated wastewater from the treatment system, from July through September 1993. Although the acts continued after Hansen left his decision-making position, the acts occurred at his direction. This evidence was sufficient for the jury to reasonably conclude beyond a reasonable doubt that his acts were in furtherance of the violations.

Id. at 28a (footnotes omitted).

The court of appeals rejected petitioner Randall Hansen's contention that his convictions should be set aside because "under the laws of bankruptcy and corporate governance, he lacked the authority to close the plant or to allocate the funds for the needed capital improvements." 01-1112 Pet. App. 29a. The court observed that "[b]ankruptcy does not insulate a debtor from environmental regulatory statutes." *Id.* at 30a (citing *Ohio* v. *Kovacs*, 469 U.S. 274, 284-285 (1985), and *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 507 (1986)). The court further explained that in his capacity as Executive Vice-President and acting CEO, petitioner Randall Hansen

> received daily reports about the plant's operations and environmental problems, wrote and received memos regarding specific plant operational problems, received monthly written environmental

> reports and oral environmental reports. He admitted that Hanlin's bankruptcy was not an excuse for violating environmental laws. There is no indication that he asked the Hanlin Board or the bankruptcy court to close the plant. The evidence indicates that he apparently misled them into believing that environmental compliance was not a problem.

Id. at 31a (citations omitted).

The court of appeals also rejected the claim of petitioner Taylor "that he should not be held responsible for the environmental violations that occurred after he resigned as plant manager * * * on 16 July 1993." 01-1112 Pet. App. 32a. The court explained that petitioner "returned shortly thereafter as a project engineer and continued in that position until the plant closed," and that in that capacity "Taylor was directly involved in responding to the plant's environmental and safety problems." *Ibid.* The court concluded that

> [a]lthough Taylor left his managerial position, he continued to work in a position in which he directed or authorized acts of the employees on environmental and safety problems. Testimony at trial indicated that, in October 1993, Taylor was aware of the wastewater overflow from the cellrooms, the excess loss of mercury, and the use of the tank cars for wastewater storage, and that he supervised the release of the overflow. This evidence was sufficient for the jury to conclude beyond a reasonable doubt that these acts were in furtherance of the violations.

Id. at 32a-33a (footnotes omitted).

b. The court of appeals rejected petitioners' contention that the evidence was insufficient to support their convictions for knowing endangerment under RCRA. 01-1112 Pet. App. 40a-48a. The court recognized that

"[f]or a conviction of knowing endangerment under the RCRA, the government must prove that the defendants knowingly caused the illegal treatment, storage, or disposal of hazardous wastes while knowing that such conduct placed others in imminent danger of death or serious injury." *Id.* at 40a. The court concluded that "[t]he evidence showed that [petitioners] knew that the conditions of the plant were dangerous and that the conditions posed a serious danger to the employees." *Id.* at 44a; see *id.* at 44a-46a (reviewing trial evidence).

c. The court of appeals held that petitioners were not entitled to judgments of acquittal on the charge of conspiring to violate environmental laws. 01-1112 Pet. App. 48a-51a. Based on the evidence presented at trial, the court concluded that petitioners "shar[ed] the common goal to operate the plant until a buyer could be found. The jury could infer from this goal and [petitioners'] knowledge of the plant's continuing problems with worker safety and environmental compliance that they reached a tacit agreement to operate the plant in violation of environmental laws." *Id.* at 51a. The court noted as well that petitioners "frequently communicated with each other regarding operation of the plant despite the continuous environmental concerns." *Ibid.*

d. The court of appeals rejected petitioner Randall Hansen's contention that the government had failed to prove the scienter element of the CWA and RCRA charges. 01-1112 Pet. App. 51a-53a. The court explained that

> although [petitioner] did not directly cause the violations, he knew that the plant was violating its permit on an almost daily basis, accumulating wastes that it could not treat, and was frequently releasing the wastes from the cellrooms as needed

> to keep the plant operational. * * * [Petitioner] knew that the plant was incapable of complying with the environmental standards and knew that the violations were inevitable.

Id. at 52a. The court "conclude[d] that the evidence that [petitioner] permitted the plant employees to process the hazardous wastes as they had in the past despite his knowledge that the procedures were in violation of environmental regulations was sufficient to show that [petitioner] acted 'knowingly.'" *Id.* at 52a-53a.

e. The court of appeals rejected various challenges made by petitioners to the jury instructions given at trial. 01-1112 Pet. App. 53a-68a. Petitioners contended, *inter alia*, that the instruction given by the district court on supervisor liability allowed the jury to return a guilty verdict if it found constructive rather than actual knowledge of the violations. *Id.* at 63a. The court of appeals quoted the district court's instruction that "a person acts knowingly if he acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness." *Id.* at 62a. The court noted as well that the instruction on supervisor liability required the jury to find "that the Defendant acted knowingly in failing to prevent, detect or correct the violation." *Id.* at 63a. The court concluded that "[b]ecause the instructions clearly set forth that a finding of 'acted knowingly' was required for a conviction, there was no error in the instruction." *Id.* at 64a.

ARGUMENT

1. Petitioners contend (01-1104 Pet. 17-26; 01-1112 Pet. 18-26) that the district court's instructions allowed the jury to find them guilty of environmental violations

of which they did not have knowledge. They assert that, by affirming their convictions, the court of appeals "improperly eliminated the 'actual knowledge' standard by deeming the regulations at issue to be public welfare statutes and allowing the jury to convict without the Government proving that the Petitioners had the *mens rea* necessary to commit the violation." 01-1112 Pet. 13. That argument reflects a misunderstanding both of the court of appeals' decision and of the jury instructions given at trial.

a. Federal laws that criminalize "knowing" violations of statutory requirements are generally read to require proof that the defendant had knowledge of the facts that constitute the offense. See *Bryan* v. *United States*, 524 U.S. 184, 193 (1998); cf. *Staples* v. *United States*, 511 U.S. 600, 608 n.3 (1994) (defendant generally must "know the facts that make his conduct fit the definition of the offense"). Consistent with that principle, courts have required proof that defendants accused of violating RCRA, 42 U.S.C. 6928(d), knew that they were causing the treatment, transportation, storage, or disposal of a hazardous waste. See *United States* v. *Goldsmith*, 978 F.2d 643, 645-646 (11th Cir. 1992); *United States* v. *Dean*, 969 F.2d 187, 191 (6th Cir. 1992), cert. denied, 507 U.S. 1033 (1993). With respect to RCRA's knowing endangerment provision, the statute states the knowledge requirement explicitly: the defendant must be aware that his violation of other provisions of RCRA "is substantially certain to cause danger of death or serious bodily injury." 42 U.S.C. 6928(f)(1)(C); see *United States* v. *Protex Indus., Inc.*, 874 F.2d 740, 744 (10th Cir. 1989). Those knowledge requirements apply regardless of whether the defendant is a line employee who personally performs the forbidden act, or a higher-level corporate officer who

causes the violation to occur through the exercise of supervisory authority. See *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 55 (1st Cir. 1991).

The court of appeals in affirming petitioners' convictions did not hold or suggest that their positions as corporate officers permitted them to be convicted without proof that they possessed the requisite knowledge. Despite petitioners' contentions, the court did not treat felony violations of the CWA and/or RCRA as "public welfare" offenses (01-1112 Pet. 19-20; see 01-1104 Pet. 23, 26) or "convert[] the CWA into a strict liability statute" (01-1112 Pet. 24). To the contrary, the court of appeals recognized that the validity of petitioners' convictions required proof that each petitioner "associated himself with the criminal venture" and "shared the same unlawful intent as the actual perpetrator." 01-1112 Pet. App. 26a (quoting *United States* v. *Hamblin*, 911 F.2d 551, 557 (11th Cir. 1990), cert. denied, 500 U.S. 943 (1991)). In affirming petitioner Randall Hansen's CWA and RCRA convictions, the court acknowledged that those statutes "contain explicit knowledge requirements" (*id.* at 52a), and it "conclude[d] that the evidence that [petitioner] permitted the plant employees to process the hazardous wastes as they had in the past despite his knowledge that the procedures were in violation of environmental regulations was sufficient to show that [petitioner] acted 'knowingly'" (*id.* at 52a-53a). There is consequently no basis for petitioners' contention (01-1104 Pet. 24-26; 01-1112 Pet. 20) that the court of appeals' decision conflicts with decisions in other circuits declining to treat environmental felonies as public welfare offenses.

b. As the court of appeals explained (01-1112 Pet. App. 60a-64a), the district court instructed the jury on

the applicable knowledge requirements. See 01-1104 Pet. App. 85a, 89a-90a. The crux of petitioners' challenge to the district court's instructions is that the instruction on supervisor liability may have confused the jury into disregarding the instructions on the knowledge required for each RCRA count.[2] That case-specific claim does not warrant this Court's review.

In any event, the argument lacks merit. At the end of the jury charge on the RCRA counts, the district court explained the circumstances under which a supervisor could be held criminally liable for RCRA violations committed by his subordinates. In full, the pertinent jury instruction read as follows:

> Each Defendant may be found guilty of Count 22 through 34 of the Indictment if you find that the Government has proven the following beyond a reasonable doubt:
>
> *First*: that the Defendant under consideration had a responsible relationship to the violation—that is, that it occurred under his area of authority and supervisory responsibility;
>
> *Second*: that the Defendant had the power or the capacity to prevent the violation; and
>
> *Third*: that the Defendant *acted knowingly* in failing to prevent, detect or correct the violation.

---

[2] Petitioner Randall Hansen also argues (01-1104 Pet. 19 n.17) that the supervisor liability instruction could have misled the jury about the mental state requirements under the CWA and CERCLA. The instruction expressly stated, however, that it applied only to counts 22 through 34—the RCRA counts. 01-1104 Pet. App. 95a.

01-1104 Pet. App. 95a (emphasis added). The third paragraph of the instruction thus made clear that the jury could find petitioners guilty only if it determined that they had "acted knowingly." The district court had previously instructed that "[a] person acts knowingly if he acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness." *Id.* at 85a. Those instructions did not allow the jury to find any of the petitioners guilty without determining that he knew of the RCRA violations, because it is impossible for a supervisor to "act knowingly" in failing to prevent or correct a violation without being aware of that violation.

Petitioner Randall Hansen suggests (01-1104 Pet. 18) that, by instructing the jury that it could convict a petitioner for knowingly failing to detect or to correct a RCRA violation within the scope of his supervisory responsibility, the supervisor liability instruction allowed the jury to return a guilty verdict even if petitioner had no knowledge of the violation (for knowingly failing to detect) or learned about the violation only after it stopped (for knowingly failing to correct).[3] Those arguments are raised for the first time in his petition for a writ of certiorari. This Court generally does not address claims that were neither properly raised nor de-

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[3] Although petitioner Randall Hansen points out (01-1104 Pet. 18 n.15) that at sentencing the district court remarked that petitioner learned about some violations only "after the fact," the court of appeals concluded that petitioner "knew that the plant was incapable of complying with the environmental standards and knew that the violations were inevitable." 01-1112 Pet. App. 52a. The court of appeals also held that "[e]ach of the substantive offenses were foreseeable consequences of the [petitioners'] agreement to continue operating the plant in violation of the environmental statutes." *Id.* at 51a.

cided below. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). At any rate, the arguments lack merit. To knowingly fail to detect a violation is to deliberately avoid knowledge of it, which the law has long equated with actual knowledge.[4] See, *e.g.*, *United States* v. *Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) ("deliberate effort to avoid guilty knowledge is all the law requires"); *United States* v. *Jewell*, 532 F.2d 697, 700 (9th Cir.) ("deliberate ignorance and positive knowledge are equally culpable"), cert. denied, 426 U.S. 951 (1976). With respect to knowingly failing to correct a violation, a violation can only be corrected while it is still ongoing. A defendant who *knowingly* failed to correct a violation, therefore, must have known about the violation while it was still ongoing.

c. Petitioners contend (01-1104 Pet. 20-23; 01-1112 Pet. 23-24) that, if not erroneous on the RCRA illegal storage and disposal counts, the supervisor liability instruction was at least erroneous on the RCRA knowing endangerment count. RCRA's knowing endangerment provision incorporates each of the elements of a hazardous waste treatment, storage, or disposal violation under 42 U.S.C. 6928(d)(2)(A), plus two additional elements: (1) that the hazardous waste violation placed other persons in "imminent danger of death or serious bodily injury"; and (2) that the defendant had knowledge of that danger. 42 U.S.C. 6928(e). In instructing the jury on the mental state element of the knowing endangerment offense, the district court explained:

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[4] With respect to the knowing endangerment count, the district court instructed the jury that "[t]he Defendant may not * * * affirmatively shield himself from knowledge. You may treat such deliberate avoidance of positive knowledge as the equivalent of knowledge." 01-1104 Pet. App. 90a.

> [I]n addition to finding that such Defendant placed another person in imminent danger of death or serious bodily injury, you must also find that the Defendant was actually aware or actually believed that his conduct was substantially certain to cause danger of death or serious bodily injury. *A Defendant is only responsible for his own actual awareness or actual belief.* Another person's knowledge of the danger or knowledge that the Defendant should have had or could have had under other circumstances does not suffice and *cannot be attributed to the Defendant under consideration.*

01-1104 Pet. App. 90a (emphasis added). That instruction closely tracked the language of the statute. See 42 U.S.C. 6928(f)(1)-(2).

The supervisor liability instruction in no way undermined those specific knowledge requirements. That instruction required the jury to determine whether each petitioner "had a responsible relationship to *the violation*—that is, that [the violation] occurred under his area of authority and supervisory responsibility." 01-1104 Pet. App. 95a (emphasis added). The nature of "the violation" differs for each of the specific RCRA offenses. Because a knowing endangerment violation under 42 U.S.C. 6928(e) includes both unlawful conduct (treatment, storage, or disposal of hazardous waste) *and* a resulting dangerous condition, the supervisor liability instruction allowed the jury to find a petitioner guilty only if it determined that both the conduct and the dangerous condition occurred within the petitioner's scope of "authority and supervisory responsibility." And because the supervisor liability instruction made clear that petitioners could be found guilty only if they "acted knowingly" (01-1104 Pet. App. 95a), it could

not plausibly be thought to have obscured the import of the prior instruction (*id.* at 90a) that specifically addressed the scienter element of the knowing endangerment offense.

In any event, the court of appeals recognized that to establish the elements of a knowing endangerment violation, "the government must prove that [petitioners] knowingly caused the illegal treatment, storage, or disposal of hazardous wastes while knowing that such conduct placed others in imminent danger of death or serious injury." 01-1112 Pet. App. 40a; see *id.* at 44a ("The evidence showed that [petitioners] knew that the conditions of the plant were dangerous and that the conditions posed a serious danger to the employees."). In sustaining the instructions given on that count, the court explained that

> RCRA's knowing endangerment provision also requires proof that the hazardous waste violation placed persons in "imminent danger of death or serious bodily injury" and that the defendant had knowledge of that danger. 42 U.S.C. § 6928(e). Because the instructions clearly set forth that a finding of "acted knowingly" was required for a conviction, there was no error in the instruction.

Id. at 64a. It is therefore clear that the court of appeals correctly understood the scienter element of the knowing endangerment offense. The fact-specific question whether the combination of instructions given in this case expressed the governing standard with sufficient clarity does not warrant this Court's review.

2. Petitioners Christian Hansen and Taylor argue (01-1112 Pet. 14-18) that the court of appeals erred in upholding their convictions for violations that occurred

when they were no longer manager of the plant.[5] Petitioners contend that, by affirming their convictions for those violations, the court of appeals "essentially assumes liability without the necessary showing of a nexus between the act or omission forming the basis of the liability and a person's responsibility for that act or omission." *Id.* at 18.

In fact, the court of appeals expressly found that petitioners contributed to the violations of which they were convicted, even those that occurred when they were not plant manager. With respect to petitioner Christian Hansen, the court found that petitioner's actions when he was plant manager were a contributing cause of violations that continued after he had left that position: "Although the acts continued after [Christian] Hansen left his decision-making position, the acts occurred at his direction." 01-1112 Pet. App. 28a. As for petitioner Taylor, the court noted that petitioner returned to the plant soon after he resigned as plant manager and worked as a project engineer until the plant closed, "a position in which he directed or authorized acts of the employees on environmental and safety problems." *Id.* at 32a. Thus, the court of appeals did not simply assume a nexus between petitioners' actions and the violations, but rather held that the evidence was sufficient for the jury to find that petitioners had aided and abetted each of the violations of which they were convicted. Moreover, even if petitioners had not personally contributed to each of those violations, they

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[5] Taylor resigned as plant manager on July 16, 1993, returning shortly thereafter as a project engineer, the position that he held until the plant closed. 01-1112 Pet. App. 32a. After being deposed as Hanlin's CEO, Christian Hansen worked as acting plant manager from July 16, 1993, to October 1993. *Id.* at 27a-28a.

still would be criminally responsible for all the violations under the doctrine of co-conspirator liability. See *Pinkerton* v. *United States*, 328 U.S. 640, 646-647 (1946).[6]

Petitioners' reliance (01-1112 Pet. 16-18) on *United States* v. *Anthony Dell'Aquilla Enter. & Subsidiaries*, 150 F.3d 329 (3rd Cir. 1998), and *United States* v. *Township of Brighton*, 153 F.3d 307 (6th Cir. 1998), is misplaced. Those cases involved the application of Clean Air Act and CERCLA provisions imposing *strict liability* on "operators" of facilities at which violations occurred. See *Dell'Aquilla*, 150 F.3d at 332-334; *Township of Brighton*, 153 F.3d at 312-314.[7] For purposes of those provisions, the courts of appeals required proof that the defendant exercised managerial responsibilities (*Township of Brighton*, 153 F.3d at 314) at the time of the violations (*Dell'Aquilla*, 150 F.3d at 334). In this case, by contrast, petitioners' criminal liability rested not on their status as "operators" of the relevant *facility*, but on their personal knowledge of and responsibility for the environmental *violations*. And while the court of appeals sustained petitioners' convictions for violations that occurred after they left their managerial positions, the court did not suggest that petitioners

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[6] In upholding petitioners' conspiracy convictions, the court of appeals explained that petitioners "shar[ed] the common goal to operate the plant until a buyer could be found. The jury could infer from this goal and [petitioners'] knowledge of the plant's continuing problems with worker safety and environmental compliance that they reached a tacit agreement to operate the plant in violation of environmental laws." 01-1112 Pet. App. 51a.

[7] This Court's decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998) (see 01-1112 Pet. 14-15), likewise involved the interpretation of CERCLA's strict liability provision, 42 U.S.C. 9607(a)(2). See 524 U.S. at 55-56.

could be held strictly liable based on their status as former corporate managers.

3. Petitioners Christian Hansen and Taylor contend (01-1112 Pet. 26-30) that this Court should grant certiorari to "resolve the friction between the bankruptcy and environmental regulations." According to petitioners (*id.* at 28), this case presents the question "whether a corporate officer or employee can be held criminally liable for environmental violations even when he had no authority to act to prevent, control or mitigate those violations because the corporation was in bankruptcy." Because petitioners concede (*ibid.*) that the issue they seek to raise "has not been addressed below or by other courts," the question is not ripe for this Court's review. In any event, the issue is not presented in this case. The court of appeals found not merely that petitioners had failed to prevent the plant's environmental violations, but that they had knowingly acted in furtherance of the violations by directing and supervising the unlawful acts, by misleading the Hanlin board and the bankruptcy court into believing that environmental compliance was not a problem at the plant, and by misrepresenting to state environmental authorities the causes of the plant's violations. See 01-1112 Pet. App. 26a-33a.

4. Petitioner Randall Hansen argues (01-1104 Pet. 26-30) that this Court should grant certiorari to determine whether employees of a single corporation can conspire to commit a criminal offense in violation of 18 U.S.C. 371. He raises that claim for the first time in his petition for a writ of certiorari. This Court generally does not address claims that were neither properly raised nor decided below. See *Williams*, 504 U.S. at 41.

There is, moreover, no disagreement on this issue among the federal courts of appeals. Petitioner relies

on a law review article, which itself admits that "every federal appellate court that has squarely addressed the issue has affirmed the validity of intracorporate conspiracy prosecutions in which multiple corporate agents were involved." Shaun P. Martin, *Intracorporate Conspiracies*, 50 Stan. L. Rev. 399, 412 (1998). The article concedes, moreover, that the text of 18 U.S.C. 371 "does not exclude the conviction of * * * individuals for conspiracy based upon wholly intracorporate conduct." *Id.* at 440. The thrust of the article is that corporate entities should not be subject to vicarious criminal liability for conspiracies among their individual employees, not that the individuals themselves should escape prosecution under the conspiracy statute. See 50 Stan. L. Rev. at 440 n.250.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1104

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

RANDALL W. HANSEN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is the preeminent bar organization advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has more than 10,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization in its House of Delegates. NACDL promotes study and research in the field of criminal law. NACDL has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice. In furtherance of its objectives over the past decade, NACDL frequently files *amicus* briefs with this Court on various criminal justice issues. *See* NACDL's website at www.nacdl.org.

This brief is submitted in support of the petitioner; *amicus* urges the Court to grant certiorari.[1,2]

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[1] Counsel for the parties have consented to the filing of this *amicus* brief; the letters are on file with the Clerk of the Court.

[2] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or their counsel.

BACKGROUND OF THE CASE

LCP Chemicals-Georgia ("LCP"), a division of Hanlin Group, Inc. ("Hanlin"), owned and operated an industrial plant in Brunswick, Georgia (the "plant") at which a mercury cell, chlor-alkali process was used to manufacture chlorine gas, sodium hydroxide, and bleach, principally for the paper and wood pulp industries. The plant generated contaminated wastewater and waste sludges. The plant also utilized other chemicals and produced hazardous substances that were subject to certain environmental regulations, including wastewater discharge limitations set forth in LCP's National Pollutant Discharge Elimination System ("NPDES") permit; the permit authorized the plant to store wastewater while awaiting treatment in LCP's wastewater treatment plant. LCP also generated hazardous wastes subject to Resource Conservation and Recovery Act ("RCRA") regulation. The plant's operations also were subject to Occupational Safety and Health Administration ("OSHA") regulations designed to ensure for the protection and safety of workers.

LCP's parent corporation, Hanlin, filed a voluntary petition for bankruptcy under Chapter 11 in July, 1991. The bankruptcy proceedings severely limited the funds available for maintenance, repair and environmental compliance at the plant. LCP had operational and compliance problems from 1993 until the plant closed in 1994, which it duly reported to the Georgia Environmental Protection Department ("EPD") in LCP's Discharge Monitoring Reports.

The volume of wastewater exceeded LCP's wastewater treatment capacity, and LCP pumped the wastewater into empty oil tanks for storage before treatment and final discharge from the

wastewater treatment plant. In 1993, LCP experienced other operational problems which it promptly reported to Georgia EDP.

When the plant closed in 1994, GA EDP turned the Brunswick plant over to the U.S. Environmental Protection Agency ("EPA"). EPA listed the facility as a Superfund site and commenced cleanup.

The United States criminally prosecuted individual officers and employees of Hanlin, including petitioner herein, for violations of federal environmental statutes: the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d)(2)(A) and (e), the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b)(3) ("CERCLA"), and the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) ("CWA").

The criminal indictments charged the petitioner and his co-defendants with exceeding the NPDES permit limits (Counts 2-21); for storing wastewater on the cellroom floors and permitting some to escape into the environment (Counts 22-32); for storing wastewater in oil tanks (Count 33); for knowingly endangering employees by exposing them to impermissibly stored wastes and wastewater (Count 34); for taking an endangered species in violation of the Endangered Species Act (Count 42) and for conspiring to commit those violations between July 1, 1985 and February 1, 1994 (Count 1). Unlike his father Christian Hansen and the plant manager, Alfred R. Taylor, Randall was not charged with failing to notify the U.S. Government of unpermitted releases of chlorine or wastewater to the environment (Counts 35-41).

Randall Hansen was charged and convicted, as were Christian and Taylor, on all counts with which they were charged, except for Count 42 – the Endangered Species Act violation. The district court sentenced Randall Hansen to serve 46 months of

incarceration and to pay a fine of $20,000: it sentenced Christian Hansen to serve 108 months of incarceration and to pay a $20,000 fine, and it sentenced Taylor to serve 78 months of incarceration but without a fine. The district court denied the all defendants' post-trial request for a judgment notwithstanding the verdict and/or a new trial.

On August 24, 2001, the Eleventh Circuit Court of Appeals issued a 74 page *per curiam* opinion, affirming the convictions on all counts. The Eleventh Circuit improperly relied on the responsible corporate officer doctrine as a basis for finding liability under environmental criminal statutes.

Questions Presented

1. Whether the "responsible corporate officer" doctrine can be used to hold a person liable where that person no longer had the authority or the capacity to prevent the violations charged and was not in a decision-making role for the corporation at the time the violations occurred.
2. Whether a criminal conviction based on the "responsible corporate officer" doctrine for violations of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d) & (e), the Clean Water Act, 33 U.S.C. § 1319(c), and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b) requires the defendant to have actual knowledge of each element charged in the offense.

3. Whether the "responsible corporate officer" doctrine permits felony conviction of individual corporate officers for "failure to detect" violations under environmental statutes for which Congress required proof of actual knowledge.

4. Whether a jury instruction on the doctrine of "responsible corporate officer" permits conviction for "knowing endangerment" under 42 U.S.C. §§ 6928(e) and (f) without a jury finding that the individual corporate officer was actually aware or actually believed that his conduct was substantially certain to place others in imminent danger of death or serious injury.

Issues This Brief of *Amicus Curiae* Will Address

This brief *amicus curiae* will address the issue of the erosion of the *mens rea* requirement by the expansion of the concept of "public welfare offense," particularly as applied to "environmental crimes," and the unwarranted expansion of the reach of "public welfare offense."

Importance of the Issues

Substantive criminal law has expanded enormously, and today expresses an extraordinary range of purposes including not only that of minimizing violent behavior threatening to lives and property, but also the regulation of economic enterprise, protection of the environment, correction of relations among races and genders, alteration in habits of consumption of liquor, drugs, and sex. *See, e.g.*, R. Pound, CRIMINAL JUSTICE IN AMERICA 23 (1930)) . The rise of what is often referred to as the "regulatory

state" has imposed new functions and problems on the law. One of the more troublesome of these is the cluster of problems involving the relations of the criminal law to the conduct of economic enterprise. These problems have a long history,(*see* J. Hall, THEFT, LAW AND SOCIETY 62-70 (2d ed. 1952)), but the complexity of commerce and economic activity has increased immeasurably in the last century, as have the regulatory ambitions and mandates of government. *See* F. Allen, The Morality of Means: Three Problems in Criminal Sanctions, 42 U. PITTSBURGH L. REV. 737, 742 (1981).

Although the courts, including this Court, have paid lip service to the fundamental importance of the concept of *mens rea* in our criminal law, the actual treatment of that concept has been haphazard, undisciplined and poorly reasoned. This Court has not, since the early part of the last century, addressed the issue whether there are constitutional dimensions to that concept; and its treatment of *mens rea* in that era was, in the words of one noted scholar of criminal law, "flimsy. . .dictum" that became a doctrine that "passed into our constitutional law that severe criminal punishment may be inflicted at the legislature's will, regardless of whether the defendant had any opportunity to conform his conduct to the requirements of law." H. Packer, Mens Rea and the Supreme Court, 1962 SUPREME COURT REVIEW 107, 116.

In *Hansen*, the Eleventh Circuit dangerously broadened the scope of liability in the environmental criminal arena -- despite the heavy penalties that may result from convictions under RCRA and the CWA.

ARGUMENT

Amicus curiae believes that *certiorari* is warranted in this case because the decision of the Eleventh Circuit in this case is at odds with this Court's interpretation of the requirements of the "responsible corporate officer" doctrine and fundamental precepts of criminal law with regard to *mens rea*, and that it improperly expanded and misapplied the concept of "public welfare offense" to a case involving environmental "crimes" that have severe penalties.

The Eleventh Circuit upheld an unprecedented extension of the "responsible corporate officer" doctrine, first articulated by this Court in *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1971) for strict liability misdemeanor offenses, to serious felony environmental crimes. The decision eroded the required standards for criminal liability of individual corporate officers by sustaining an intra-corporate "conspiracy" theory, predicated solely on standard business discussions among corporate executives dealing with their company's bankruptcy. The resulting standard has serious legal and policy implications; it not only will permit conviction of innocent individuals, but also ultimately will deter participation in responsible corporate behavior essential to environmental compliance.

The Eleventh Circuit's decision is symptomatic of the improper reduction of the Government's burden of proof through the elimination of the *mens rea* requirement.

I.
THE COURT SHOULD DECIDE WHETHER MENS REA IS A DUE PROCESS REQUIREMENT

Early in the last century, the concept of strict criminal liability entered this Court's jurisprudence through two cases that are remarkable for their lack of clarity and peculiar procedural contexts. See *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57 (1912) and *United States v. Balint*, 258 U.S. 250 (1922)[3]. As Professor Packer observed, "The constitutional point, only fleetingly referred to in the Government's brief [in *Balint*], was quickly dismissed by the Court. The only basis. . .was a reference to *Shevlin-Carpenter*, followed by the assertion that 'Many instances of this [dispensation with *mens rea*] are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.' [Balint, 258 U.S. at 252] The question was not one of constitutionality, but merely of legislative intent." Herbert L. Packer, Mens Rea and the Supreme Court, 1962 SUPREME COURT REVIEW 107, 113-114.

Although this Court has narrowed the range of cases in which *mens rea* is not required for conviction, it has done so on a piecemeal basis, without confronting the constitutional due process issue head on. Indeed, one leading scholar has characterized the Court's jurisprudence on *mens rea* in harsh terms: "From beginning to end, there is scarcely a single opinion . . . of the Court which confronts the question in a fashion which

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[3] *Balint*, the foundation upon which the Court dispensed with so fundamental a protection as the requirement of *mens rea*, was decided *ex parte*, and in an opinion that was only five pages long.

deserves intellectual respect." Henry M. Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 431(1958).

Instead of undertaking a fundamental review of its somewhat disjointed and contradictory jurisprudence in this area, the Court has resorted to a piecemeal approach: by finding *mens rea* required when a statute arguably infringes First Amendment rights (*e.g. United States v. X-Citement Video*, 513 U.S. 64 (1994)); by limiting the reach of the doctrine of "public welfare offense" (*e.g. Morissette v. United States*, 342 U.S. 246 (1942), *Staples v. United States*, 511 U.S. 600 (1994)); by statutory construction and presumptions that in the absence of explicit language, and in light of the "disfavored status" of criminal laws that dispense with *mens rea*, the Court would read a statute that imposes criminal penalties as requiring proof of scienter.(*e.g., Morissette, supra, Liparota v. United States*, 471 U.S. 419 (1985), *Posters 'N" Things v. United States*, 511 U.S. 513 (1993)); or by requiring proof of actual involvement or control by a parent company (and, presumably, its officers) before liability (even civil) attaches for violations of an environmental statute (*United States v. Bestfoods*, 524 U.S. 51 (1998)).

An effort to articulate the constitutional basis of the concept of *mens rea* should be made, because what underlies that concept is the recognition that criminal sanctions are distinctive both in their severity and their moral overtones, and that their distinct character must be recognized, not only in the procedures by which they are invoked and applied, but also in the substance of what punishment is meted out. As the drafters of the Model Penal Code note:

> The liabilities involved [in criminal penalties] are indefensible, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of

> probation or imprisonment may be imposed. It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed.

Model Penal Code, sec. 2.05 and Comments at 282-283 (American Law Institute 1985).

II.

THE COURT OF APPEALS' USE OF THE "RESPONSIBLE CORPORATE OFFICER" DOCTRINE IN THIS CASE WAS AN UNWARRANTED AND DANGEROUS EXPANSION OF THE CONCEPT OF "PUBLIC WELFARE OFFENSE"

In *United States v. Dotterweich*, 320 U.S. 277 (1943) and in *United States v. Park*, 421 U.S. 658 (1975) this Court adopted the "responsible corporate officer" doctrine for a very limited category of strict liability "public welfare" or "regulatory" offenses[4], under which criminal liability may be imposed "upon a person otherwise innocent but standing in responsible relation

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[4] *See Staples v. United States*, 511 U.S. 600, 606 (1994).

to a public danger." *Dotterweich*, 320 U.S. at 281. The statute in *Dotterweich* and *Park* – the Federal Food, Drug, and Cosmetic Act – "dispense[d] with the conventional requirement for criminal conduct awareness of some wrongdoing." *Id.* Justice Frankfurter's reasoning in *Dotterweich* is reminiscent of totalitarian "ends justify the means" logic. He, and the Court, rejected defendant's plea for the constitutional protection and defendant's *mens rea* claim in only sixty-seven words:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct--awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon **a person otherwise innocent** but standing in responsible relation to a public danger. United States v. Balint, 258 U.S. 250.

320 U.S. 277, 280-281 (1943)(emphasis supplied). Professor Packer characterized this passage as "offhand" and reflecting a "primitive and rigid view of *mens rea*. . . ." H. Packer, *op. cit.* at 119.

So-called public welfare offenses (*See generally* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933), the classic article on public welfare offenses) usually are thought of as being limited to *mala prohibita* crimes such as traffic offenses and those involving the sale of intoxicating liquor, narcotics, and impure food or drugs. (*Id.* at 72-73, 84-88)[5]. They have come to comprise a catch-all category for "any crime

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[5] *See Staples v. United States* 511 U.S. 600, 607 (1994); *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971).

construed to dispense with mens rea" (H. Packer, *Mens Rea and the Supreme Court*, 1962 SUPREME COURT REVIEW 104, 146), one that encompasses an ever-growing number and variety of strict liability crimes. *See* Model Penal Code, sec. 2.05, Comment 2, at 284-291.

Ever since Sayre gave the term "public welfare offense" currency, this category of offense has been treated as the main "exception" to the principle of *mens rea*, but it has been used by the courts as a convenient pigeon-hole for any crime construed as not requiring *mens rea*. The concept of the public welfare offense openly flouts the principle of of *mens rea*.[6]

Despite the large body of decisional law that affirms dispensing with the mental element in violations of various regulations, there is conspicuous lack of authority explicitly considering and avowing the propriety of distinctively "criminal" sanctions in statutes that are held to be public welfare offenses. Indeed, these offenses have been treated as something different from traditional criminal law, as a hybrid category to which the odium and hence the safeguards of criminal process do not attach.

And despite the long recognition of strict and vicarious

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[6] In *Staples*, the Court noted that it has "referred to public welfare offenses as 'dispensing with' or 'eliminating' a *mens rea* requirement or 'mental element,' see, *e.g., Morissette,* 342 U.S., at 250, 263, 72 S.Ct. at 249-250; *United States v. Dotterweich,* 320 U.S. 277, 281, 64 S.Ct. 134, 136-137, 88 L.Ed. 48 (1943), and have described them as strict liability crimes, *United States v. United States Gypsum Co.,* 438 U.S. 422, 437, 98 S.Ct. 2864, 2873, 57 L.Ed.2d 854 (1978). While use of the term 'strict liability' is really a misnomer, we have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea;* that is, the requirement of a "guilty mind" with respect to an element of a crime. Under such statutes we have not required that the defendant know the facts that make his conduct fit the definition of the offense. Generally speaking, such knowledge is necessary to establish *mens rea,* as is reflected in the maxim *ignorantia facti excusat.*" *Staples*, 511 U.S. 600, 607 (1994).

liability in American criminal law, virtually no reasoned literature supports these doctrines. The arguments favoring liability without culpability rarely go beyond the assertion of Justice Jackson in *Morissette*:

> While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.

Morissette v. United States, 342 U.S. 246, 256 (1952).

This Court, however, has generally been reluctant to "expand the doctrine of crimes without intent" beyond public welfare offenses that carry light penalties. *See Morissette v. United States,* 342 U.S. 246, 260 (1952); *Staples*, 511 U.S. 600, 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea.* Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.") and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). *See also United States v. United States Gypsum,* 438 U.S. 422, 442, n. 18 (1978) (noting that an individual violation of the Sherman Antitrust Act is a felony punishable by three years in prison or a fine not exceeding $100,000 and stating that "[t]he severity of these sanctions provides further support for our conclusion that the [Act] should

not be construed as creating strict-liability crimes"). In the case at bar, Randall Hansen was sentenced to almost four years imprisonment, his father to nine years imprisonment, and Taylor to six and one-half years imprisonment. These are hardly "light penalties" or "short jail sentences."[7]

The Eleventh Circuit's decision conflicts with this Court's prior application of the "responsible corporate officer" doctrine because it imposes liability on persons who had no responsibility or authority to prevent or correct the charged violations. The Eleventh Circuit improperly eliminated the "actual knowledge" standard by deeming the regulations at issue to be public welfare statutes and allowing the jury to convict without the Government proving that the Petitioners had the *mens rea* necessary to commit the violation.

The "actual knowledge" issue has been addressed by the Supreme Court in *Staples v. United States*, 511 U.S. 600, 616 (1994), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994), but not in the context of environmental statutes.

The criminal provisions of the CWA and RCRA do not, properly read, impose strict liability on a defendant and converting them to "public welfare statutes" by removing the

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[7] The distinction between "light" and "heavy" punishment is somewhat blurred in any event, for a person convicted of a strict liability crime is convicted in the same court as other criminals, liable to imprisonment in the same prison, suffers the same loss of rights of citizenship, and conviction does the same "grave damage to an offender's reputation." *Morissette v. United States*, 342 U.S. 246, 256 (1952). Whatever the ultimate goals of criminal punishment, it seems clear that our system of criminal justice, by its labels and actions, intend to, and do, mark those convicted as having committed a serious wrong. *See* A. Saltzman, Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process, 24 WAYNE L. REV. 1572, 1580 (1978).

mens rea element violates constitutional guarantees of due process.

The confusion in the *scienter* requirements of the "responsible corporate officer" doctrine results from the failure of courts to distinguish the occasions when the "responsible corporate officer" doctrine is applied to true public welfare statutes from those where the "responsible corporate officer" doctrine is applied to regulations that call for explicit knowledge and impose severe criminal penalties, such as the CWA and RCRA. Several courts have properly held the government to its burden of proving a defendant's knowledge of each element of the crime and have declined to apply the public welfare offense doctrine to environmental statutes. *See United States v. Ahmad,* 101 F.3d 386 (5th Cir. 1996) (holding that the CWA is not a public welfare statute); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Cir. 1991) (distinguishing RCRA, which requires specific intent, from the public welfare statutes at issue in *United States v. Dotterweich,* 320 U.S. 277 (1943) and *United States v. Park,* 421 U.S. 658 (1975).

Other courts of appeals have applied the gloss of the public welfare doctrine to "knowing" violations of RCRA and the CWA and have held persons criminally liable as responsible corporate officers without the requisite showing of specific intent. *See United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 438-39 (6th Cir. 1998); *United States v. Wilson,* 133 F.2d 251, 262-63 (4th Cir. 1997).

This Court has not explicitly addressed the *mens rea* requirement of environmental criminal statutes such as CWA and RCRA. This case presents the Court with an opportunity to clarify the confusing and contradictory standards expressed by the circuit courts of appeals and reaffirm the holdings of *Staples* and *X-Citement* in the environmental law context.

In *Hanousek v. United States,* 528 U.S. 1102, 1103-05 (2000), Justices Thomas and O'Connor called into question the application of the public welfare doctrine to the CWA in terms that are also applicable to RCRA. *Hanousek v. United States*, 528 U.S. 1102, at 1103-05 (2000). They noted that "... it is erroneous to rely, even in small part, on the notion that the CWA is a public welfare statute." They also noted that the circuits were split on this issue, and urged the Court to "further delineate [the] limits" of the public welfare doctrine. *Id.* Justices Thomas and O'Connor believe, as do most commentators and the drafters of the Model Penal Code, that the seriousness of the penalties (felonies with three to six years in prison) "counsels against concluding that the CWA can accurately be classified as a public welfare statute." *Id.* at 1104. A broad application of the public welfare statute concept is particularly pernicious because classifying criminal statutes, such as the CWA and RCRA, as public welfare statutes merely because they regulate conduct that is subject to extensive regulation and may involve risk to the community "would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities." *Id. See also, United States v. Weitzenhoff*, 35 F.3d 1275, 1295 (9th Cir. 1994)(Kleinfeld, J., dissenting), *cert. denied*, 513 U.S. 1128 (1995).

The very substantial prison sentences imposed in *Hansen* confirm Justice Thomas' and O'Connor's concerns in *Hanousek*, and weigh against classifying the CWA and RCRA as public welfare statutes. We believe that the concerns of Justices Thomas and O'Connor were well founded, and that the Court should grant *certiorari* in this case to clarify the law, and to instruct the lower courts that diminishing or eliminating the ***mens rea*** requirement is unconstitutional. We respectfully submit that, because of the serious penalties they impose, these statutes cannot be considered public welfare statutes which do not require proof of ***mens rea.***

III.

THE JURY INSTRUCTION UPHELD BY THE COURT OF APPEALS INCORRECTLY PERMITTED CONVICTION UNDER A DIMINISHED *MENS REA* STANDARD

In this case, the Eleventh Circuit upheld a diminished *mens rea* requirement for corporate officers. Although the Eleventh Circuit arguably stated the correct legal standard, the "responsible corporate officer" instruction of the trial court which it affirmed eliminated the statutory *mens rea* not only for knowing endangerment (count 34), but also for lesser RCRA offenses (counts 22-33).

A person violates RCRA if he "knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter" without a permit. 42 U.S.C. sec. 6928(d)(2)(A). This Court has held that the use of the word "knowingly" in a federal criminal statute requires "proof of knowledge of the facts that constitute the offense." *Bryan v. United States,* 524 U.S. 184, 193(1998). *See also Staples v. United States*, 511 U.S. 600, 619(1994) (interpreting implied statutory knowledge element to require proof "that petitioner knew of the features of his gun that brought it within the scope of the Act"); *Morissette,* 342 U.S. at 271 (interpreting implied statutory knowledge element to require proof that defendant "had knowledge of the facts . . that made the taking a conversion").

The "responsible corporate officer" instruction in this case required no knowledge of any particular facts constituting the offenses; it permitted the jury to convict if petitioner merely "acted knowingly in failing to . . . detect or correct the violation." (R22-200). Thus the jury was permitted to convict for failure to correct, even though the jury could find that petitioner first

acquired knowledge of the violation after its occurrence, as the district count concluded he did.(*See, e.g.*, R14-235-236 (Randall "was notified of these violations after the fact"). Further, the concept of "failure to detect" a violation authorized the jury to convict even if the defendant did not have actual knowledge at any time.

While the district count used a *mens rea concept* in the jury instruction *(i.e.*, "acted knowingly"), it also instructed the jury that the phrase "acted knowingly" meant only that a person "acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness." R2-188. For a defendant merely to "realiz[e] what he is doing" *(i.e.*, to be generally aware of the nature of his conduct) falls far short of an actual awareness of the circumstances and results of his conduct.

The error was even more palpable with respect to the application of the "responsible corporate officer" instruction to the "knowing endangerment" counts under RCRA. Knowing endangerment occurs only if "a person who knowingly transports, treats, stores, disposes of' or exports any hazardous waste," in violation of 42 U.S.C. sec. 6928(d), also "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." 42 U.S.C. sec. 6928(e). Congress adopted a version of the Model Penal Code's definition of knowledge specifically for RCRA's knowing endangerment provision. *See* 42 U.S.C. sec. 6928(f)(l) and Model Penal Code sec. 2.02(2)(b).[8]

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[8] *See also*, Kenneth R. Feinberg, Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code, 18 AM. CRIM. L. REV. 123, 129 (1980) ("S. 1722 replaces the confusing and inconsistent ad hoc approach to culpability that now characterizes federal criminal law with a new system that has its genesis in the Model Penal Code").

The district count's "responsible corporate officer" instruction failed to require proof that petitioner had actual knowledge -- i.e., actual awareness or actual belief – of any existing circumstances or expected results of his conduct, thus eviscerating the statutory *mens rea* requirement. It permitted the jury to convict Randall of knowing endangerment based only on a finding, at most, that he had a general awareness of the nature of his conduct within the meaning of section 6928(f)(l)(A).

The Eleventh Circuit did not recognize the significant differences in these culpability requirements, upholding the instruction merely because it included the phrase "acted knowingly."

CONCLUSION

As Justices Thomas and O'Connor stated in their recent dissent to the denial of a petition for a writ of *certiorari* in *Hanousek v. United States*, 528 U.S. 1102, 1103-05 (2000), the Court should resolve the split in the circuits and decide whether CWA and RCRA are public welfare statutes, should elucidate the scope of the "public welfare offense" concept in federal law, and should address, for the first time in a considered way, the constitutional due process implications of dispensing with proof of *mens rea* as an prerequisite for criminal conviction and punishment.

May 1, 2002

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Martin S. Kaufman, an attorney admitted to practice before the bar of this Court, hereby declares under penalty of perjury, that three copies of the foregoing brief of *amicus curiae* National Association of Defense Lawyers in support of the petitioner was served on the following counsel of record for the parties on the 1st day of May, 2002, by depositing same in a postal depository box under the care of the United States Postal Service, in a properly addressed, first class postage prepaid envelopes addressed to:

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No. 01-1104

IN THE

Supreme Court of the United States

RANDALL W. HANSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing amicus curiae briefs in this and other federal courts promoting a limited and accountable government and opposing overreaching by those administrative agencies and courts which act contrary to the plain meaning of the language chosen by Congress in the substantive statutes at issue.[1]

WLF participated as amicus curiae in this case below as well as in numerous other cases which, like the present case, raise the important issue of whether proof of *mens rea* in the criminal application of environmental statutes is required. *See, e.g., United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied,* 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

The Manufacturers Alliance/MAPI, Inc. is a non-profit policy research organization supported by more than 500 manufacturing companies from a broad range of industries. Its members range in size from relatively small, single-product manufacturers to very large, highly diversified manufacturers with annual sales revenues

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[1] This brief is being filed with the consent of all parties. Letters of consent are on file with the Clerk of this Court. Pursuant to Sup. Ct. R. 37.6, amici hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief.

exceeding one billion dollars. Its mission is to assist its members in improving productivity by stimulating investment in technology and by encouraging innovations, thereby enhancing its members worldwide competitiveness.

Of particular relevance to this case, the Manufacturers Alliance's Environmental Management Council promotes the exchange of practical and timely information concerning the executive management of manufacturers' environmental, health, and safety programs, and encourages "best practices" in complying with applicable regulatory requirements.

Amici will provide the Court with a broader perspective to this case than that provided by the parties and will present additional reasons why this Court should grant the petition, namely, (1) the unwarranted and unlawful expansion of the "responsible corporate officer" doctrine to obtain felony convictions for specific intent crimes under environmental statutes, and (2) the counterproductive and undesirable effects that such expansion likely will have on the governance of firms with industrial operations.

INTRODUCTION AND STATEMENT OF THE CASE

This case pushes the envelope of the "responsible corporate officer" doctrine far beyond any case decided since this Court articulated the doctrine in *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975). In *Park* and *Dotterweich*, the Court affirmed misdemeanor convictions of company officers under criminal provisions of the food safety law

from which Congress intentionally omitted any *mens rea* requirement and under which only light jail terms are possible. In the present case, the petitioner was convicted of felonies under criminal provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(2)(A), and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6928(d)(2)(A) and (e), both of which require "knowing" conduct on the part of the defendant, and for which substantial prison terms of several years are not only possible, but, as this case demonstrates, likely to be imposed.

This case thus presents the question of whether the court of appeals so misconstrued and misapplied this Court's *Park/Dotterweich* responsible corporate officer doctrine by greatly expanding it to allow its use to support felony convictions under statutes requiring actual knowledge of the offense and for which substantial prison terms are provided.

Christian Hansen, father of the petitioner, was the founder and president of Hanlin Group, Inc. (Hanlin). In 1991, the financially troubled company was forced into bankruptcy under Chapter 11. A year later, the father convinced his son, petitioner Randall W. Hansen, who lived with his family in New Jersey, to temporarily serve as Executive Vice President of LCP Chemicals, a division of Hanlin, because the post had become vacant. Pet. App. 2a. Randall Hansen's mission was to develop "the business and financial plans necessary to turn around the financial condition of the chemicals business." Pet. App. 6a. One of LCP's assets was its Brunswick, Georgia facility, which produced a variety of commercially vital chemical compounds.

The Brunswick facility had experienced several environmental problems that predated Randall Hansen's hiring. The environmental problems revolved around the facility's wastewater treatment system. The facility was authorized to discharge wastewater to a nearby creek after treatment in the facility's wastewater treatment system. Pet. App. 3a. The capacity of the wastewater treatment system, however, was not always sufficient to keep up with the volume of wastewater generated by the facility's operations. Accordingly, LCP's discharge permit authorized the facility to temporarily hold wastewater on the floors of two large "cellrooms," pending treatment. Pet. App. 4a.

With the onset of Hanlin's bankruptcy in 1991, "funds for maintenance, repair, and environmental compliance were restricted." Pet. App. 6a. With almost no funds for maintenance or repair, the wastewater treatment system broke down frequently. When this occurred, the facility accumulated excessive levels of wastewater in the cellrooms and occasionally had to discharge untreated wastewater to the environment, in violation of the facility's CWA permit. LCP reported such unpermitted discharges to the Georgia Environmental Protection Division ("EPD"), which administered the permit. Pet. App. 10a.

After being told of the unpermitted discharges by the plant manager, Randall Hansen "attempted to find funds [for plant repairs] by selling excess equipment and reducing the payroll but the funds remained limited." Pet. App. 6a. He also requested the Hanlin Board of Directors, the bankruptcy creditor's committee and the court for funds to address the wastewater problem, but those

requests were denied. *Id.* Randall Hansen made efforts to sell the plant to a company with resources to correct the problems, but those efforts eventually failed and the plant closed in February 1994.

Over *four years* later, Randall Hansen was indicted along with his father and two other plant managers and charged with: (1) knowingly discharging pollutants in violation of the CWA permit; (2) knowingly storing, treating or disposing of hazardous waste without a RCRA permit; (3) through the RCRA violations, knowingly endangering employees at the plant, such that they were placed in imminent danger of death or substantial harm; and (4) conspiring with other officers of Hanlin to violate these environmental laws.

At trial, the defense vigorously contested the prosecution's claim that Randall Hansen had sufficient actual knowledge to be charged with "knowing endangerment." Only one employee testified about an actual injury relating to exposure to wastewater. The employee claimed that sometime between 1986 and 1993 (he could not even remember what year in that seven-year period of time), he had fallen into a sump of the wastewater and suffered minor chemical burns. The witness testified that he simply showered off, never sought medical attention, *and never reported the incident to Hanlin or LCP management.*[2]

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[2] By adding a "knowing endangerment" count under RCRA, the prosecution was taking what was akin to a worker safety violation under the Occupational Safety and Health Act (OSHA), for which the maximum sentence is six months imprisonment in the case of a fatality resulting from a wilful violation of an OSHA regulation (29

At the close of evidence, the trial judge instructed the jury regarding the various elements of the CWA and RCRA violations charged. Over the objections of petitioner's counsel, the trial judge added to his instructions on the RCRA charges a summary proposed by the prosecution. The summary stated that the jury could convict the individual defendants, including Randall Hansen, if the jury found:

> *First*: that the Defendant under consideration had a responsible relationship to the violation – that is, that it occurred under his area of authority and supervisory responsibility;
> *Second*: that the Defendant had the power or the capacity to prevent the violation; and
> *Third*: that the Defendant acted knowingly in failing to prevent, detect or correct the violation.

Pet. App. 95a.

The prosecution cited *United States v. Park* as its principal authority for giving this instruction. Pet. App. 100a. The trial judge, over the renewed objection of the petitioner's counsel, instructed the jury that this summary could be used to convict the petitioner of Count 34, "knowing endangerment." Pet. App. 53a. Randall Hansen was convicted on all counts, including knowing endangerment. As a first offender, model citizen, and father of two young children, he was sentenced to the draconian sentence of 46 months of incarceration.

U.S.C. § 666(e)), and turning it into a knowing endangerment RCRA violation, where no fatality or serious injury resulted, for which the maximum sentence is 15 years

Amici shall focus their brief on the "knowing endangerment" count because it dramatically illustrates the fatal flaw of applying the responsible corporate officer doctrine to a specific intent felony offense under RCRA.[3]

SUMMARY OF ARGUMENT

Our system of criminal law is founded on the fundamental principle that to convict a defendant of a crime and deprive him of his liberty, the government must establish, beyond a reasonable doubt, that the defendant possessed a criminal state of mind, or *mens rea*, and that there is sufficient evidence to prove such knowledge beyond a reasonable doubt. The responsible corporate officer doctrine, articulated by this Court in *Dotterweich* and *Park,* is, and must remain, a very narrow exception to this rule. The rule essentially relieves prosecutors of the *mens rea* element of proof for violations of what are referred to as "public welfare legislation." Under this doctrine, a person may be held criminally liable for wrongful conduct of others within the corporate infrastructure by virtue of having held a responsible position within the corporation. Both *Dotterweich* and *Park* involved misdemeanor violations of the federal food safety law for which the defendants were not imprisoned. Neither case, however, affords federal prosecutors a short cut to felony convictions for environmental crimes carrying

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[3] Amici note that a separate joint petition has been filed by Christian Hansen and Alfred Taylor in this case. *Hansen v. United States*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1112). Amici submit that if Randall Hansen's petition is granted, then the companion joint petition should also be granted because it raises similar issues.

lengthy prison terms.

In the present case, the Eleventh Circuit affirmed the Petitioner's felony conviction for "knowing endangerment" under RCRA, endorsing the government's use of the responsible corporate officer doctrine to supplant an express *mens rea* requirement. To be convicted of knowing endangerment, RCRA requires proof that the defendant had "actual awareness" that his conduct could cause death or severe injury to employees and expressly prohibits attribution of knowledge to satisfy this *mens rea* requirement.

Nevertheless, the Eleventh Circuit affirmed Randall Hansen's conviction for knowing endangerment simply because he had the authority to prevent the violation and failed to do so. Neither *Dotterweich* and *Park* contemplate use of the responsible corporate officer doctrine to obtain a felony conviction of a specific intent offense such as "knowing endangerment."

If allowed to stand, the Eleventh Circuit's decision would work a manifest injustice and violate due process by permitting the incarceration of individuals for several years without having to show sufficient evidence to prove *mens rea*. The decision would also undermine environmental protection by setting the threshold for criminal conduct so low that it will chill or discourage educated and capable people from serving in a corporate environmental capacity.

REASONS FOR GRANTING THE WRIT

The Petition presents an important question of federal law – whether prosecutors may use the responsible corporate officer doctrine in felony prosecutions of environmental crimes, which effectively would eliminate the government's burden of proof as to the required *mens rea* element of these violations, and subject corporate officers to strict liability for felony offenses simply by virtue of their corporate positions. This issue has never been specifically addressed by this Court and, as the Petitioner notes, the Circuit Courts of Appeal are in conflict. Pet. 24. Accordingly, guidance from this Court is needed to settle this important question.

I. THE COURT OF APPEALS MISAPPLIED THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

A. The Responsible Corporate Officer Doctrine Only Applies to Misdemeanor Violations of Public Welfare Legislation Where Punishment Is Light

Traditionally, our laws have required a showing that a defendant charged with a crime has performed a wrongful act with a wrongful intent: "an evil-meaning mind" and "an evil-doing hand." *See Morissette v. United States*, 342 U.S. 246, 251 (1952). The responsible corporate officer doctrine is an exception to the rule. Under this doctrine, a corporate officer may be held criminally liable even if the officer did not personally participate in a wrongful act, if his position and authority empowered him to prevent or correct the conduct which

gave rise to the violation. *Dotterweich,* 320 U.S. at 281.

In *Dotterweich*, the president of a pharmaceutical company was prosecuted for shipping adulterated and misbranded drugs in violation of the Federal Food, Drug and Cosmetic Act (FFDCA). 21 U.S.C. § 331. Although the adulteration of the drugs was found to have been accidental, the defendant's conviction was affirmed. Balancing the relative interests and burdens, this Court stated:

> Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

320 U.S. at 284-85.

Thirty years later, in *United States v. Park*, this Court once again reviewed a CEO's conviction for adulteration under the FFDCA. The CEO of a retail grocery chain admitted to having received notice from the Food and Drug Administration of unsanitary conditions at one of the company's food warehouses after officials inspected the building. There also was evidence that two later inspections revealed that the unsanitary warehouse conditions had not been corrected. 421 U.S. at 661-62, 664. Because the CEO was in a position to have

prevented the violation, this Court affirmed the CEO's conviction, stating:

> [T]he Act imposes not only a positive duty to seek out and remedy violations when they occur, but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance impose on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

421 U.S. at 672.

Central to the Court's decision to affirm the convictions in *Dotterweich* and *Park* was its finding that the FFDCA violations at issue were "public welfare" offenses. The hallmarks of a public welfare offense are unmistakable under FFDCA: Congress eliminated the government's requirement to prove that the defendant acted with criminal intent.[4] But, so as not to offend notions of due process, Congress denominated the offenses as misdemeanors with only light jail terms possible. The

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[4] As the Court noted in *Park*, in 1948 the Senate passed an amendment to the FFDCA, which would impose criminal liability only for violations committed "willfully or as a result of gross negligence." The amendment, however, was stricken in conference, confirming Congress' intent to eliminate any *mens rea* requirement. 421 U.S. at 672, n.15.

Court has repeatedly identified these same two hallmarks – no mens rea requirement and light jail time – in upholding public welfare offense convictions. *See, e.g., Morissette*, 342 U.S. at 256 ("[P]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"); *Staples v. United States*, 511 U.S. 600, 617-18 (1994) ("[T]he cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties or short jail sentences. . . . [A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement").

The FFDCA public welfare offenses at issue in *Dotterweich* and *Park* had no *mens rea* requirement; they were misdemeanor violations; and carried only light jail terms or fines for a conviction. *Dotterweich* and *Park* do not legitimize use of the responsible corporate officer doctrine for prosecuting felony offenses, particularly those with express *mens rea* requirements and the possibility of lengthy prison sentences. Yet, the Eleventh Circuit endorsed the use of the responsible corporate officer doctrine in convicting Randall Hansen of "knowing" violations of RCRA and CWA felony provisions which, under the U.S. Sentencing Guidelines, carry mandatory multi-year prison sentences.[5] As discussed below, the

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[5] Prior to the adoption of the U.S. Sentencing Guidelines in 1987 requiring determinate sentencing, the normal practice was that a defendant receiving a sentence of more than one year would be eligible for parole after serving one-third of the sentence. 18 U.S.C. § 4205(a) (1987). Congress abolished the practice of parole with the use of determinate sentencing under the U.S. Sentencing Guidelines. Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, § 218(a)(5),

inappropriateness of the responsible corporate officer doctrine is most glaring in the case of the RCRA "knowing endangerment" offense.

B. The *Mens Rea* Language of the RCRA "Knowing Endangerment" Felony Provision and its Fifteen-Year Maximum Sentence are Incompatible with the Responsible Corporate Officer Doctrine

Enacted in 1976, RCRA sets forth a detailed scheme for the cradle-to-grave management of hazardous wastes. 42 U.S.C. §§ 6901-6992k(1994). A facility must obtain a RCRA permit to perform almost any activity involving management of hazardous waste. RCRA prohibits a person from "knowingly" storing, treating, disposing, or transporting any hazardous waste without a permit or in violation of any existing RCRA permit condition. 42 U.S.C. § 6928. Such "knowing" violations are felonies, punishable by fines of up to $50,000 for each day of violation, and imprisonment of up to five years, or both. *Id.*

In the present case, the trial court permitted the use of the responsible corporate officer doctrine to convict Randall Hansen not only of RCRA violations requiring "knowledge," but also of the much more serious charge under RCRA of "knowing endangerment," which carries potential fines of up to $250,000 and imprisonment of up to fifteen years. 42 U.S.C. § 6928(e). RCRA defines

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98 Stat. 2027 (1984) (repealing 18 U.S.C. § 4205 as of Nov. 1987). Thus, Randall Hansen's 46-month sentence is comparable to a pre-guideline sentence of a staggering 138 months, or *11 1/2 years*.

knowing endangerment as having occurred only where "a person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste," in violation of 42 U.S.C. § 6928(d), also "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." *Id.* So as to leave no doubt about the mental state required to convict a defendant of knowing endangerment, Congress provided "special rules" to govern the knowing endangerment provision. *See* 42 U.S.C. § 6928(f). Among these special rules is the following, which can only be read as prohibiting application of the responsible corporate officer doctrine:

> In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury – (A) the person is responsible only for *actual* awareness or actual belief that he possessed; and (B) *knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.*

42 U.S.C. § 6928(f)(2)(A)-(B) (emphasis added).

Notwithstanding the clear statutory requirement that a defendant must have "*actual* awareness" that his conduct placed another in imminent danger of death or severe injury, and the further statutory proviso that such actual awareness cannot be attributed or imputed to a defendant, the Eleventh Circuit found no error in the "responsible corporate officer" instruction that the district court gave the jury. Under that instruction, the jury could convict Randall Hansen of knowing endangerment even if they

concluded he did not have "actual awareness" of the danger to workers posed by mismanagement of hazardous waste. Thus, Randall Hansen was convicted of a felony, ordered to pay a $20,000 fine, and sentenced to 46 months in prison – not because he had "actual awareness" of an endangerment, but because he had the misfortune of being a corporate officer for a bankrupt company. Pet. App. 14a, 59a; R14-235-12, 13. Such a result is not only contrary to the statutory language of RCRA, but it is also at odds with this Court's prior articulation of the circumstances in which it is proper to use the responsible corporate officer doctrine.

The Eleventh Circuit's misapplication of the responsible corporate officer doctrine can perhaps be attributed to uncertainty over the contours of the public welfare offense doctrine. Justice Thomas commented on the vagaries of the public welfare doctrine in his dissent from the denial of certiorari in *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting). In *Hanousek*, the defendant supervisor was sentenced to one year imprisonment for "negligently violating" the Clean Water Act because an independent contractor, hired by the supervisor's employer, accidentally punctured a pipeline, releasing a small amount of oil into a nearby river. Justice Thomas urged this Court to reexamine the contours of the public welfare doctrine in view of "the Court of Appeals' overly broad interpretation of this doctrine." *Id.*

The government's use of the responsible corporate officer doctrine to prosecute Randall Hansen for "knowing endangerment" – a felony for which a 15-year prison sentence is possible – announces a new era in prosecution of environmental crimes and cries out for redress by this

Court. The time has come for this Court to step in and clarify the circumstances under which the government may convict a corporate official of criminal offenses without having to prove criminal intent, and the necessity of ensuring that sufficient evidence was presented to the jury to prove the existence of *mens rea* beyond a reasonable doubt.

II. IF ALLOWED TO STAND, THE COURT OF APPEALS DECISION WILL IMPOSE UNJUSTIFIED RISKS ON CORPORATE MANAGERS TO THE DETRIMENT OF THE PUBLIC INTEREST

No less than the former Assistant Administrator for the EPA Office of Solid Waste, Donald Clay, has concluded that understanding the Nation's hazardous waste laws is beyond the grasp of all but a handful of career bureaucrats working for EPA:

> RCRA is a regulatory cuckoo land of definition . . . . I believe we have five people in the agency who understand what "hazardous waste" is. What's hazardous one year isn't -- wasn't hazardous yesterday, is hazardous tomorrow, because we've changed the rules . . . . You have a waste that in one state is hazardous and in another isn't because they haven't adopted a rule yet. It is a legal statutory framework rather than logical, based on concentration and threat type of thing.

United States v. White, 766 F. Supp. 873, 882 (E.D. Wash. 1991).

Given the complexity of RCRA, no CEO of a large company could be expected to maintain expertise in RCRA and provide direct oversight of compliance with its provisions while simultaneously discharging a CEO's duty to run the company. CEOs have no choice but to delegate responsibility for RCRA compliance to corporate environmental managers. Under the responsible corporate officer doctrine, however, delegating responsibility is no defense; a responsible corporate officer can be convicted without knowledge that a specific violation is occurring. Thus, to expand the *Park/Dotterweich* doctrine to RCRA felonies, as the prosecution here urged and the trial court allowed, would usher in a whole new level of risk -- untenable risk -- for corporate managers.

If the Eleventh Circuit's decision is allowed to stand, corporate managers for industrial businesses may want to rethink their career choice. As some commentators have observed, applying the responsible corporate officer doctrine to prosecution of environmental felony offenses, in effect, confers "designated felon" status on industrial business managers. *See* Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L. J. 169 (1994). To borrow a phrase from the dissent in *United States v. Weitzenhoff*, it would impose on these officers "a massive legal risk, unjustified by law or precedent." 35 F.3d 1275, 1299 (9th Cir. 1994) (Kleinfeld, J., dissenting), *cert. denied*, 513 U.S. 1128 (1995). Amici urge this Court to grant certiorari and make it clear that the responsible corporate officer doctrine cannot be used to support convictions under statutes that require proof of criminal intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

RANDALL W. HANSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE BUSINESS ROUNDTABLE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Whether the "responsible corporate officer" doctrine, which this Court has applied only to statutes lacking a *mens rea* requirement, also applies to "knowing endangerment" under the Resource Conservation and Recovery Act and to other serious environmental crimes for which Congress has enacted a heightened *mens rea* requirement.

II. Whether the felony provisions of the Resource Conservation and Recovery Act and the Clean Water Act are public welfare statutes permitting convictions of individual defendants without proof of *mens rea*.

III. Whether a conviction for "corporate conspiracy" can be sustained on the basis of a lower *mens rea* requirement than that of the underlying offense.

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading national organizations that collectively represent the interests of a broad spectrum of United States industries. Each of the *amici* advocates public policies that promote vigorous and environmentally responsible economic growth.

The Business Roundtable is an association of chief executive officers of major United States corporations. The Roundtable seeks to advance policies that foster a healthy economy, for the benefit of corporations and consumers alike.

The National Association of Manufacturers (NAM) is the largest United States industrial trade association, comprising 14,000 members and 350 member associations from every industrial sector. NAM supports legislation and public policies that create a dynamic, competitive business climate for United States manufacturers.

The American Petroleum Institute (API) is the foremost United States trade association for the oil and natural gas industry. API represents over 400 member companies engaged in all aspects of that industry, and serves as a major force for advocating the public policy objectives and interests of the oil and natural gas sector.

As advocates of responsible economic and industrial growth, *amici* strongly support compliance with federal and state environmental regulation. *Amici* are concerned, however, that the decision in *United States* v. *Hansen*, 262 F.3d 1217 (11th Cir. 2001) (per curiam), impermissibly expands criminal liability for corporate officers far beyond

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of this Court. No counsel for any party has authored this brief in whole or in part. No monetary contributions to the preparation or submission of this brief have been made by any person or entity other than *amici curiae* and their counsel. Sup. Ct. R. 37.6.

what Congress specified in enacting the felony provisions of federal environmental laws. The result below actually undermines respect for the law by eroding the link between criminal and moral culpability.[2]

INTRODUCTION

This case involves a corporate CEO, Randall Hansen,[3] whose primary responsibility at LCP Chemicals-Georgia ("LCP") was to address the company's debilitating financial problems and to guide the company through the bankruptcy process. *Id.* at 1229. As CEO, Hansen had overall responsibility for managing the corporation—including environmental affairs—but he apparently did not personally order or direct any environmental violations. Moreover, because the company was in bankruptcy, he evidently did not have a free hand to make environmental or other major decisions. Significantly, the bankruptcy court actually denied the company's request for certain environmental compliance funds. See *id.* at 1237. But notwithstanding Hansen's relatively limited responsibility for, and involvement with, environmental matters—involvement the sentencing judge characterized as "after the fact" and possibly "unintentional"[4]—he was convicted and sentenced to a lengthy period of incarceration under the "knowing

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[2] The mental state associated with moral culpability is variously referred to herein as *mens rea* (or "guilty mind"), scienter, or criminal "intent."

[3] *Amici* focus principally on petitioner Randall Hansen because, as chief executive officer, the role of the "responsible corporate officer" jury instruction in diminishing the applicable *mens rea* standard is starkest in his case. The legal arguments, however, also apply to separate petitioners Christian A. Hansen and Alfred R. Taylor. *See Hansen* v. *United States*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1112). *Amici's* legal arguments concern only the lower courts' failure to implement the relevant statutory requirements, and do not imply any broader position regarding the defendants' actions.

[4] R14-235-6, -8.

endangerment" provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(e).[5] His conviction was flawed because it was based on jury instructions that effectively vitiated the statutory *mens rea* requirement and replaced it with vicarious liability under the "responsible corporate officer" doctrine. This hyper-extension of the Court's public welfare offense precedents of *United States* v. *Dotterweich*, 320 U.S. 277 (1943), and *United States* v. *Park*, 421 U.S. 658 (1975), is seriously misguided and dangerous. It may discourage corporate officer involvement in regulatory matters,[6] and it circumvents the express will of Congress to require heightened, not relaxed, standards of personal culpability to establish guilt for serious environmental crimes.

If this Court corrects the error, and instructs the lower courts to give effect to statutory *mens rea* requirements, it would not absolve corporate officers of responsibility for their intentional wrongdoing—it would simply uphold the standards for criminal intent that Congress expressly provided for certain environmental crimes.

REASONS FOR GRANTING THE PETITION

The courts below effectively eliminated the personal culpability requirements expressly set forth in law. Instead of adhering to the statutory requirements, the lower courts allowed corporate officers to be convicted if they "had a

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[5] Hansen was also convicted of "knowing" violations of both RCRA, 42 U.S.C. § 6928(d)(2)(A), and the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(2)(A). The impropriety of vicarious criminal liability is clearest with regard to the "knowing endangerment" provision of RCRA, but equally applicable to other felony provisions of RCRA and the CWA that specify a "knowing" state of mind. Proof of *mens rea* is required by any statute that criminalizes "knowing" violations.

[6] *Cf. United States* v. *Weitzenhoff*, 35 F.3d 1275, 1295 (9th Cir. 1994) (Kleinfeld, J., dissenting) (this use of the doctrine deters work in regulated fields), *cert. denied*, 513 U.S. 1128 (1995).

responsible relationship to the violation," "had the power or capacity to prevent the violation," and "acted knowingly in failing to prevent, detect or correct the violation." App. 95a. Pursuant to this jury instruction, guilt was a function of status, not intentional wrongdoing. Even the limited "knowledge" component of the *Hansen* jury instruction related only to whether Hansen knowingly failed to "prevent, detect or correct" the violation, rather than whether he "knowingly transport[ed], treat[ed], store[d], dispose[d] of, or export[ed] any hazardous waste . . . *know[ing] at that time* that he thereby place[d] another person in imminent danger of death or serious bodily injury," as the statute requires. 42 U.S.C. § 6928(e) (emphasis added). Congress could not have devised statutory language more demanding and unequivocal; it is simply not possible to reconcile this statute's intrinsically personal standard of liability with the "status" crime permitted by the trial court.

The "responsible corporate officer" doctrine, in contrast, arose in the context of public welfare statutes that contain no *mens rea* requirement and impose light penalties. In *Staples* v. *United States*, 511 U.S. 600, 618 (1994), this Court strongly suggested that the public welfare offense doctrine does not apply to felonies, but ultimately left this question open. Nonetheless, the district court in *Hansen* did not observe this Court's admonition in *Staples*, *id.*, against diminished intent standards for felonies, and permitted Hansen to be convicted of felony crimes based on what the court described as "after the fact" knowledge of LCP's environmental problems, R14-235-6, and regardless of whether Hansen's conduct was "intentional or unintentional," R14-235-8. The court of appeals upheld the convictions as though the relevant statutory provisions did not contain heightened *mens rea* requirements.

Hansen presents an opportunity to take up the question left open in *Staples*, and to revive the fundamental moral culpability requirement for serious, felony crimes.

I. *HANSEN* RELIES ON VICARIOUS CRIMINAL LIABILITY REJECTED BY CONGRESS.

Hansen demonstrates the acute need for providing guidance to the lower courts in applying the "responsible corporate officer" doctrine where Congress has established intent and knowledge as specific elements of a felony. The doctrine was developed by this Court for regulatory offenses where Congress had not specified *mens rea* elements and where the statute imposed only misdemeanor penalties. See *Park*, 421 U.S. at 671-74 (construing the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 331(k)); *Dotterweich*, 320 U.S. at 285 (same).

As a device used to increase the reach of liability for corporate crimes, the doctrine allows "responsible corporate officers" to be personally convicted if they bear a "responsible relation" to the business activity in question. *Dotterweich*, 320 U.S. at 285. Liability derives from the individual's status as a corporate officer; personal fault and actual knowledge are not required for a conviction. See *id.* at 281. Any corporate officer who "shares responsibility in the business process" that resulted in illegal conduct may be held vicariously liable for the corporation's acts. *Id.* at 284.

This Court has not yet addressed whether the "responsible corporate officer" doctrine applies to environmental crimes that require actual knowledge and carry felony penalties. The circuit courts are split on this issue, with some courts—including the 11th Circuit—effectively permitting vicarious, or derivative, liability under this doctrine, even where *mens rea* is an element of the statute at issue.

A. The Felony Statutes At Issue Here Unmistakably Require *Mens Rea*.

Both the text and the legislative history of RCRA demonstrate that Congress specified a heightened *mens rea* requirement for the "knowing endangerment" provision of that Act. RCRA explicitly states that conduct only amounts

to "knowing endangerment" if a "person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . *knows at that time* that he thereby places another person in imminent danger of death or serious bodily injury." 42 U.S.C. § 6928(e) (emphasis added). Accordingly, to be convicted, the defendant must have personal knowledge of, and personal involvement with, the specific disposition of the hazardous waste at issue, and also have actual knowledge[7] of the extreme danger posed to others by such disposition *at the time the defendant "transports, treats . . . [or] disposes of" the hazardous waste. Id.* (emphasis added). It is clear on the statute's face that one who learns of dangerous conduct only after it has occurred does not possess the requisite *mens rea*.

Moreover, vicarious liability and imputed knowledge are plainly foreclosed by the statute. *Id.* § 6928(f). A defendant "is responsible only for actual awareness or actual belief that he possessed" and "knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant." *Id.* § 6928(f)(2)(A), (B). Congress thus codified the rule that a criminal defendant's knowledge must be personal; one may not be convicted based solely on one's corporate position or responsibilities. Knowledge possessed only by others in the corporation is similarly insufficient. Contrary to the district court's jury instructions, a defendant who merely discovers or fails to discover prior misconduct could not have the *mens rea* for "knowing endangerment." *See id.*

The legislative history of RCRA's "knowing endangerment" provision further reflects Congress' intent to create a clear and careful distinction between those individuals who possess personal, prior knowledge of danger, and those who do not. In rejecting a "reckless endangerment"

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[7] Indeed, the statute expressly requires that the defendant be "substantially certain" that his conduct will place others in imminent danger. 42 U.S.C. § 6928(f)(1)(C).

provision in favor of the "knowing endangerment" provision, Congress explained that "[t]he knowledge necessary for culpability of a natural person is *actual knowledge*, which may be established by direct or circumstantial evidence, but not constructive or vicarious knowledge." H.R. Conf. Rep. No. 96-1444, at 37 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5028, 5037 (emphasis added). A defendant lacks the necessary *mens rea* "if he did not actually have the requisite knowledge about the danger at the time he acted." *Id.* at 39, *reprinted in* 1980 U.S.C.C.A.N. at 5038.

The *Hansen* jury instruction violated each of these precepts. By charging the jury to convict based on failure to "prevent, detect or correct," App. 95a, and by acknowledging that Hansen's knowledge was "after the fact," R14-235-6, and his conduct possibly "unintentional," R14-235-8, the district court flatly disregarded the specific, textual requirements of the law.

This failure to comply with the detailed, demanding statutory requirements for proving "knowing endangerment" was echoed by the Eleventh Circuit. The court of appeals purported to recognize the need for both personal knowledge of the illegal activities and awareness of the danger posed at the time the activities occur. But the court did not devote any meaningful analysis to whether the jury had been properly instructed. The court merely stated, perfunctorily, that the jury instructions passed muster because they included the phrase "'acted knowingly.'" *Hansen*, 262 F.3d at 1253. The "knowledge" required by the district court to prove guilt differed markedly, however, from the "knowledge" required by the statute.

By instructing the jury that Hansen could be convicted of "knowing endangerment" based on his "responsible relationship to the violation," App. 95a, rather than his actual, personal knowledge and intent, the courts below allowed convictions based on the vicarious criminal liability rejected

by Congress.[8] This Court's review is necessary to steer the lower courts back toward the plain language of the statute.

B. *Hansen* Significantly Extends The "Responsible Corporate Officer" Doctrine.

This Court has declined previous opportunities to define the parameters of personal criminal liability for environmental violations. See *United States* v. *Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000); *United States* v. *Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).[9] These decisions, however, presented less extreme examples of the trend toward diminished *scienter* for environmental crimes. In prior cases, the conduct in question was more egregious, the penalties were lighter, or the relevant statutory language was less rigorous.

In *Hanousek*, the supervisor of a rock-quarrying project was convicted of a misdemeanor for negligently discharging oil into a river, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(1)(A), 1321(b)(3). The provisions at issue penalized negligent conduct, and did not include a heightened *mens rea* requirement. See 176 F.3d at 1121 ("If Congress intended to prescribe a heightened negligence standard, it could have done so explicitly."). Given these statutory provisions, the court found that the CWA constitutes public

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[8] Judge Kleinfeld criticized such judicial expansions of criminal liability in dissenting from the denial of rehearing en banc in *United States* v. *Weitzenhoff*. He said: "It is we, and not Congress, who have made [the defendants] felons. The statute, read in an ordinary way, does not." 35 F.3d at 1293 (discussing the "knowing" violation provision of the CWA, 33 U.S.C. § 1319(c)(2)(A), which was the basis for one of Hansen's convictions).

[9] This Court also recently denied certiorari in *United States* v. *Ming Hong*, 242 F.3d 528 (4th Cir.), *cert. denied*, 122 S. Ct. 60 (2001). As in *Hanousek*, Ming Hong was convicted of a misdemeanor for negligent violations of the CWA, 33 U.S.C. § 1319(c)(1)(A). 242 F.3d at 530. Moreover, illegal discharges "occurred openly while Hong was present." *Id.* at 532.

welfare legislation, and therefore allows criminal penalties without proof of *mens rea*. *Id.* at 1122. Two Justices dissented from the denial of certiorari in *Hanousek*. See *Hanousek* v. *United States*, 528 U.S. 1102 (2000). Justices Thomas and O'Connor rejected the characterization of the CWA as a public welfare statute, citing the severity of the potential penalties. *Id.* at 1103-04. *Hansen* is a significantly more compelling candidate for this Court's review because the crime at issue is a felony, the statute explicitly calls for heightened standards of personal knowledge, and the penalties imposed are considerably more severe. Compare 42 U.S.C. § 6928(d)(2), and *id.* § 6928(e), with 33 U.S.C. § 1319(c)(1)(A), and *id.* § 1321(b)(3) (express knowledge and intent requirements versus simple negligence). While Hanousek was convicted of only a misdemeanor and received a six-month prison sentence, see 176 F.3d at 1120, Hansen was convicted of a felony and sentenced to four years in prison, see 262 F.3d at 1232.

Hansen likewise represents a far greater expansion of vicarious liability than did the decision in *Weitzenhoff*. There, the Ninth Circuit affirmed the convictions of two sewage treatment plant managers who had personally ordered illegal discharges of sludge in violation of the CWA, 33 U.S.C. § 1319(c)(2). See 35 F.3d at 1282 (the defendants "instructed two employees at the plant to dispose of [sludge] on a regular basis by pumping it from the storage tanks . . . directly into the ocean"). Even in *Weitzenhoff*, where the defendants had deliberately engaged in "midnight dumping," five judges dissented from the denial of rehearing en banc, decrying the majority's erosion of *mens rea* for environmental crimes. *Id.* at 1293-99 (Kleinfeld, J., dissenting). Yet *Hansen* lowers the thresholds for criminal liability still further. Absent any personal conduct even approaching the "midnight dumping" in *Weitzenhoff*, the Eleventh Circuit affirmed Hansen's conviction without demanding proof of the statutory element of personal knowledge at the time of the actions in question

that others were thereby placed in "imminent danger." 42 U.S.C. § 6928(e).[10]

II. THE PUBLIC WELFARE OFFENSE DOCTRINE DOES NOT APPLY TO STATUTES THAT REQUIRE *MENS REA* AND IMPOSE FELONY PENALTIES.

The courts of appeals are split on the issue of whether the criminal provisions of environmental legislation are public welfare statutes that permit convictions without proof of *mens rea*. See *Hanousek*, 528 U.S. at 1103 (Thomas, J., dissenting from the denial of cert.) (noting the circuit split regarding whether the CWA is a public welfare statute); *United States* v. *Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n.4 (6th Cir. 1998) (deeming the public welfare doctrine applicable to the CWA); *United States* v. *Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (rejecting the argument that the CWA is a public welfare statute); *Weitzenhoff*, 35 F.3d at 1286 (characterizing the CWA as public welfare legislation); *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Cir. 1991) (reversing a RCRA conviction where a "responsible corporate officer" instruction dispensed with

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[10] As in *Weitzenhoff*, but unlike the present case, defendants convicted in previous environmental crime cases have been personally involved in directing or specifically authorizing the violations to a significant degree. *See, e.g.*, *United States* v. *Kelly*, 167 F.3d 1176, 1178 (7th Cir. 1999) (defendant directed the movement of hazardous materials to an unapproved disposal site); *United States* v. *Eidson*, 108 F.3d 1336, 1340 (11th Cir. 1997) (defendant gave permission for disposal in the sewer); *United States* v. *Laughlin*, 10 F.3d 961, 963 (2d Cir. 1993) (defendant personally released creosote sludge onto the ground); *United States* v. *Self*, 2 F.3d 1071, 1087 (10th Cir. 1993) (defendant directed the illegal storage of hazardous waste, then concealed the waste from inspectors); *United States* v. *Sellers*, 926 F.2d 410, 412 (5th Cir. 1991) (defendant personally dumped paint waste onto a creek embankment); *United States* v. *Hoflin*, 880 F.2d 1033, 1035 (9th Cir. 1989) (defendant instructed an employee to remove and bury paint drums); *United States* v. *Greer*, 850 F.2d 1447, 1450-52 (11th Cir. 1988) (defendant himself ordered the illegal dumping).

proof of actual knowledge). Accordingly, this Court's review would provide essential guidance regarding the legal standards applicable to environmental felonies and public welfare offenses.[11]

A. This Court Has Only Applied The "Responsible Corporate Officer" And Public Welfare Doctrines To Statutes Without *Mens Rea* Requirements.

The "responsible relationship" concept was developed in the context of public welfare statutes that impose strict liability for violations. See *Morissette* v. *United States*, 342 U.S. 246, 259-60 (1952). Public welfare statutes have been defined as laws that "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare." *Id.* at 254. Such laws punish "forbidden acts or omissions" rather than a particular mental state. *Id.* at 252-53. The "responsible corporate officer" doctrine thus originated in cases involving regulatory statutes that do not contain a knowledge requirement and that prescribe relatively small, misdemeanor penalties for violations. In *Dotterweich*, 320 U.S. at 278, the president of a pharmaceutical company whose employees had shipped misbranded and adulterated drugs was convicted of violating the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 331. The provision did not specify any *mens rea*. See *id.* Violators were guilty of a misdemeanor. See *id.* § 333. In upholding the conviction, the Court looked to the statute and noted that:

> Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise

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[11] Though the Eleventh Circuit did not explicitly refer to the public welfare doctrine, the court implicitly relied upon it by invoking the "responsible corporate officer" principle. *Hansen*, 262 F.3d at 1250-51.

> innocent but standing in responsible relation to a public danger.

320 U.S. at 281.

In *Park*, 421 U.S. at 673-74, this Court reviewed the same provision of the FDCA and explained that misdemeanor liability was proper even for a corporate officer who had no direct involvement in the criminal offense, provided he had a "responsible relationship" to the illegal actions. Further developing the doctrine, the Court held that those with supervisory responsibility were liable for failures to prevent or correct violations. *Id.* The statute at issue in both *Dotterweich* and *Park* prescribed misdemeanor penalties, contained no *mens rea* requirement, and imposed essentially strict liability for violations. Several lower courts, including the Eleventh Circuit in *Hansen*, have ignored these distinguishing attributes and reflexively applied the "responsible corporate officer" concept and the public welfare offense doctrine to statutes that require heightened *mens rea*. See, *e.g.*, *United States* v. *Hayes Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986); *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984); see also Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 Wm. Mitchell L. Rev. 987, 1006 (1990) (hereinafter *"Knowing" Environmental Crimes*) (facile application of the public welfare offense doctrine "is misguided because it juxtaposes 'knowing' crimes with an analytical model that has little, if any, applicability where a statute defines an offense in terms of a culpability requirement").

This Court's precedents indicate that the public welfare offense doctrine cannot be employed to eliminate *mens rea* requirements. In *Morissette*, 342 U.S. at 250, the Court explained that public welfare offenses are the exception to the cardinal principle that "an injury can amount to a crime only when inflicted by intention." The Court distinguished public welfare offenses, which "d[o] not specify intent as a necessary element," *id.* at 256, from the common law crime at

issue in that case, which did demand proof of intent, *id.* at 261. Where *mens rea* is required, "presumptive intent has no place." *Id.* at 275. The *Morissette* Court accordingly reversed the defendant's conviction where the trial court had instructed the jury that intent could be presumed from the defendant's act. *Id.* It follows from *Morissette* that courts may not prejudge the *mens rea* element of an offense based solely on the defendant's "responsible relationship" to an activity. The jury instruction in *Hansen*, however, impermissibly allowed the jury to infer that a "responsible relationship," rather than specific knowledge, was a sufficient basis for finding guilt.

Even where a statute is part of a regulatory scheme that operates for the public benefit, all of its provisions cannot automatically be classified as public welfare offenses for which intent need not be proven. In *Liparota* v. *United States*, this Court reviewed a conviction obtained under a statute, 7 U.S.C. § 2024(b)(1), that criminalized "knowingly" using or transferring food stamps in an unauthorized manner. 471 U.S. 419, 420 (1985). The government had argued that the food stamp program was public welfare legislation, and thus that no proof of actual knowledge was necessary. *Id.* at 432. This Court rejected that argument and held that because the statute had specified a mental state, proof of knowledge was required. *Id.* at 425-26. The public welfare offense doctrine does not apply where, as with "knowing endangerment" under RCRA, Congress has required actual knowledge and *mens rea*.

B. Felony Penalties Are Not Characteristic Of Public Welfare Offenses.

In addition to containing a *mens rea* element, the "knowing endangerment" provision of RCRA, and the "knowing" violation provisions of RCRA and the CWA, prescribe severe, felony penalties for violations. See 42 U.S.C. § 6928(d), (e); 33 U.S.C. § 1319(c)(2). By contrast, relatively light penalties have been a key attribute of public welfare offenses in this

Court's jurisprudence. According to *Morissette*, a defining characteristic of such offenses is that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." 342 U.S. at 256.

In *Staples*, 511 U.S. at 618, this Court expressly reserved the question of whether felony crimes can be characterized as public welfare offenses. The statute there, which penalized possession of an unregistered automatic weapon as a felony, was silent as to *mens rea*. *Id.* at 605. The Court nonetheless concluded that deeming the provision a public welfare statute and dispensing with *mens rea* could "'criminalize a broad range of apparently innocent conduct.'" *Id.* at 610 (quoting *Liparota*, 471 U.S. at 426). Without deciding the issue, the Court noted that the statute's harsh penalty strongly supported the conclusion that the public welfare offense doctrine did not apply in that case. The fact that "[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*," *id.* at 616, suggests "that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense," *id.* at 618; see also *Hanousek*, 528 U.S. at 1104 (Thomas, J., dissenting from the denial of cert.) (examining the CWA's felony provision and determining that "[t]he seriousness of these penalties counsels against concluding that the CWA can accurately be classified as a public welfare statute"). Consequently, even absent an explicit knowledge requirement, the Court refused to construe the statute so as to eliminate *mens rea*. Surely where, as with the statutes at issue in *Hansen*, Congress has not only prescribed felony penalties but also expressly set forth an intent requirement, the public welfare offense doctrine cannot be invoked to impose liability without proof of *mens rea*.[12]

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[12] As this Court made clear in *Staples*, the fact that certain articles contain potentially dangerous properties does not alone justify invoking the public welfare offense doctrine to dispense with *mens rea* for all legislation that regulates those articles. 511 U.S. at 611; *see also*

See M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 Loy. L.A. L. Rev. 105, 108 (1992) ("Congress has reshaped criminal environmental violations so that they no longer conform to the traditionally gentle description of public welfare offenses.").

C. Eliminating *Mens Rea* For Felonies Risks Over-Criminalizing Regulatory Offenses And Undermining The Integrity Of The Criminal Law.

Strong policy considerations support this Court's prior decisions to restrict the application of the public welfare offense doctrine to avoid converting "intent" crimes into strict liability offenses.[13] Expanding the public welfare offense doctrine to statutes such as the CWA would too readily expose those engaging in "a broad range of ordinary industrial and commercial activities" to "heightened criminal liability." *Hanousek*, 528 U.S. at 1103 (Thomas, J., dissenting from the denial of cert.).[14] Failing to give effect to

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Hanousek, 528 U.S. at 1104 (Thomas, J., dissenting from the denial of cert.) ("[W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities.").

[13] *See* Lawrence Friedman & H. Hamilton Hackney III, *Questions of Intent: Environmental Crimes and "Public Welfare" Offenses*, 10 Vill. Envtl. L.J. 1, 4 (1999) (To ignore statutory intent requirements "would indeed create a special category of 'green collar' criminals, transforming environmental statutes . . . into a virtual strict liability scheme. Under such a scheme the government would, in essence, have to make only the most minimal showing with respect to intent.").

[14] The five Ninth Circuit judges who dissented from the denial of rehearing en banc in *Weitzenhoff*, 35 F.3d at 1293, also cautioned against unduly deterring individuals from engaging in the wide spectrum of "ordinary, innocent, productive activity" that is regulated by environmental statutes.

statutory intent requirements subjects those in vitally important industries to "a massive legal risk, unjustified by law or precedent." *Weitzenhoff*, 35 F.3d at 1299 (Kleinfeld, J., dissenting).[15]

The *mens rea* requirements of RCRA and the CWA maintain the important distinction between the civil and criminal enforcement realms. Corporate officers are properly accountable for corporate wrongdoing in accordance with civil schemes where intent is not an element of the offense. They should also be criminally liable when they possess the *mens rea* specified by statute.

But imputing *mens rea* to an individual based on corporate position rather than personal action weakens the authority of the criminal law. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L.J. 2407, 2511 (1995) ("[V]iolations of federal environmental laws can involve the kind of morally culpable behavior warranting felony sanctions. The challenge is to define the sanctions in a manner more consistent with th[e] culpability touchstone."); Mark A. Cohen, *Environmental Crime and Punishment*, 82 J. Crim. L. & Criminology 1054, 1103 (1992) ("There is growing concern about . . . corporate officers held criminally liable for incidents that are not intentional or not controllable by the party being held liable. Although few would argue against strict liability for reasonable cleanup costs and third party damages, punitive sanctions . . . are another matter."); *Disappearing Distinction*, *supra*, at 217 (asserting the importance of punishing corporate environmental crime, but distinguishing between "knowing"

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[15] *See also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 220 (1991) (hereinafter *Disappearing Distinction*) (discussing the increasing criminalization of regulatory offenses and noting that "there is a social loss in defining the criminal law so that individuals cannot safely avoid its application").

violations and those unaccompanied by the *mens rea* necessary to justify criminal penalties).

The law professor who coined the phrase "public welfare offense," cautioned that "[t]he group of offenses punishable without proof of any criminal intent must be sharply limited." Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 70 (1933). If true culpability is not a prerequisite to liability for serious offenses, crime loses its moral stigma.[16] Thus, while the "responsible corporate officer" doctrine may be useful for allocating responsibility for strict liability regulatory offenses, applying it in felony cases risks over-criminalizing conduct in regulated fields.[17] It also

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[16] *See* Lazarus, *supra*, at 2442-43 ("[B]ecause moral stigma is one of a criminal conviction's essential features . . . careful definitions and procedural safeguards are critical to the viability of the sanction."); Cohen, *supra*, at 1104 ("[C]riminalization of regulatory behavior might trivialize the criminal law itself. If every action that harms society is a crime, the criminal law loses its one distinguishing characteristic—the moral stigma associated with being labeled a criminal."). The effectiveness of the criminal law is in turn undermined. *See Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting) (noting in the context of environmental crimes that "[d]ilution of the traditional requirement of a criminal state of mind . . . reduces the moral authority of our system of criminal law"); *Disappearing Distinction*, *supra*, at 193 (The "blurring of the border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control.").

[17] *See* Lazarus, *supra*, at 2449 (In the environmental realm, "[t]he only distinction between a civil and criminal violation is that criminal defendants act with a culpable state of mind."); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L.J. 1875, 1880 (1992) (Courts' growing acceptance of vicarious criminal liability shows that "[a]t the same time that courts have begun to apply the penalties of the criminal law to legal standards that evolved within the civil law, they have also shown an increasing tendency to abandon some of the most important limits on the criminal law."); *"Knowing" Environmental Crimes*, *supra*, at 1018-19 ("[I]f courts allow doctrines such as deliberate ignorance and the responsible corporate officer principle to dilute a knowledge requirement,

compromises the integrity and coherence of the criminal law, which derives much of its moral force from the crucial distinction between culpable and non-culpable states of mind. See *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting) ("It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who . . . has no evil intention or consciousness of wrongdoing."); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & Contemp. Probs. 401, 423 (1958) ("In the tradition of Anglo-American law, guilt of crime is personal.").

Preserving the intent element for serious environmental crimes also wisely constrains prosecutorial over-reaching. Imputed intent relieves the government of its burden to prove *mens rea*. This unduly eases the prosecutor's task and encourages criminal prosecution even where true culpability is lacking. See Lazarus, *supra*, at 2487. While a vigorous environmental enforcement scheme is a matter of great public importance, the public interest is not served when prosecutors operate outside legislated bounds. See Hart, *supra*, at 423 ("[M]aximizing compliance with [the] law, rather than successful prosecution of violators, is the primary aim of any regulatory statute."). Compelling lower courts to give effect to the *mens rea* requirements enacted by Congress would protect against arbitrary and unprincipled criminal enforcement. It would not preclude criminal liability for intentional wrongdoing, or strict liability for regulatory violations.

III. "CORPORATE CONSPIRACY" CHARGES MAY NOT BE USED TO CIRCUMVENT THE HEIGHTENED *MENS REA* REQUIREMENTS OF THE UNDERLYING VIOLATIONS.

The lower courts' casual approach to *mens rea* was reflected in all aspects of the *Hansen* case. Specifically, the

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the result will be criminalization of conduct which is already subject to civil enforcement on a strict liability basis for noncompliance with statutory requirements.").

courts allowed the government to rely on the less demanding conspiracy standards in lieu of proving the requisite knowledge elements for the underlying statutes.[18] The conspiracy count was based in part on the underlying substantive offense of "knowing endangerment." See R1-10. In affirming the conspiracy conviction, the court of appeals did not assess whether Hansen himself had actual, prior knowledge of imminent harm. Rather, the court determined that "the substantive offenses were *foreseeable consequences*" of the alleged co-conspirators' conduct. 262 F.3d at 1247 (emphasis added). The conspiracy charge thus allowed the government to prove its case with a simple "foreseeability" test, instead of meeting the heightened *mens rea* standard for "knowing endangerment." This use of the conspiracy count is particularly troubling in light of the fact that the "responsible corporate officer" instruction was given for the substantive offenses charged against Hansen as an individual; proof of Hansen's actual knowledge of "endangerment" was not required at any point in the proceedings.

In addition to eliding the individual responsibility elements of the underlying offenses, the opinion below failed to identify a *mens rea* sufficient to sustain the conspiracy conviction itself. To be guilty of a conspiracy under 18 U.S.C. § 371, alleged co-conspirators must share an unlawful objective. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) ("[T]he essence of [conspiracy] is an agreement to commit an unlawful act."). Individuals who act in concert but do not harbor an illegal objective do not possess the necessary *mens rea* for criminal conspiracy. No such illegal objective is apparent from the court of appeals' opinion. The conduct that the court deemed a "criminal conspiracy" appeared to consist

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[18] *Cf.* Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405, 409 (1959) (referring to "the tactical advantage [the conspiracy charge] brings to the prosecutor. By charging 'conspiracy,' he can reach persons who might escape conviction if they were proceeded against separately.").

mainly of sharing "the common goal to operate the plant until a buyer could be found." *Hansen*, 262 F.3d at 1247.

Firms in regulated industries necessarily and routinely confront regulatory challenges. Thus, Congress drafted the "knowing endangerment" provision "in a way intended to assure to the extent possible that persons are not prosecuted or convicted unjustly for making difficult business judgments where such judgments are made without the necessary scienter." H.R. Conf. Rep. No. 96-1444, at 37, *reprinted in* 1980 U.S.C.C.A.N. at 5036-37. The *Hansen* opinion may or may not cause corporate officers to eschew regulatory responsibilities, but it surely conflicts with the plain intent of Congress: Under the statutes at issue here, corporate officers making difficult environmental decisions must not be convicted of crimes in the absence of criminal intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

RANDALL W. HANSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTRODUCTION

In its Opposition ("Opp."), the government unequivocally endorses the application of a "responsible corporate officer" instruction in knowing endangerment and other serious felony prosecutions under the Resource Conservation and Recovery Act (RCRA). It seeks this Court's imprimatur on use of the instruction in future corporate officer felony prosecutions through denial of review in this case, suggesting that the court of appeals' passing recitation of the correct "actual knowledge" standard makes this case less worthy of the Court's attention. Opp. 10.

To the contrary, the Eleventh Circuit's internally inconsistent holding underscores rather than explains away the need for this Court's guidance. Precisely because the court upheld a "supervisor liability" instruction[1] that permitted conviction based on corporate status and a mere failure to detect or correct, but then simultaneously paid lip service to the statute's explicit and exacting "actual knowledge" standard, this case compounds the already pervasive confusion in the jurisprudence of corporate officer criminal liability, particularly in the environmental context.

While the government now denies that the lower courts' rulings implicated the "public welfare"[2] or "responsible corporate officer" doctrines, the principal authority the government cited in support of its "supervisor liability" instruction at trial was *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975), the cases out of which those doctrines arose. App. 99a-100a. By

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[1] Throughout its brief, the government studiously avoids the words "responsible corporate officer," preferring the moniker "supervisor liability." Yet even the court of appeals captioned part of its discussion "Reasonable [sic] Corporate Officer." App. 49a.

[2] The district court expressly held that the relevant statutes were indeed "public welfare statutes." 01-1112 Pet. App. 93a n.12.

now refusing to acknowledge the genesis and implications of the instruction, the government fails to address the split in the circuits regarding the degree to which the statutorily mandated *mens rea* can be eroded by application of the "public welfare" doctrine, an erosion cautioned against by Justices Thomas and O'Connor in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).[3]

The government's arguments to this Court signal its support for "responsible corporate officer" liability even in knowing endangerment cases for which Congress has demanded the most exacting scienter requirements. The Court should not permit such a dramatic departure from fundamental precepts of criminal liability to creep into the law *sub silentio.*

I. THE GOVERNMENT ADVOCATES AN ERODED *MENS REA* FOR CORPORATE OFFICERS

The court of appeals held that the district court properly instructed the jury to convict petitioner of "knowing endangerment" if he "had a responsible relation to the violation," "had the power or capacity to prevent the violation," and "acted knowingly in failing to prevent, detect or correct the violation." App. 95a. The government endorses this standard of status-based liability, which bears no relation to RCRA's heightened culpability requirements, especially for knowing endangerment.

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[3] Not only have commentators noted the jurisprudential quagmire presented by the level of "knowledge" required in environmental crimes; the circuits are clearly split over whether the "public welfare" doctrine is applicable in such cases. *See generally* Brief *Amici Curiae* of The Business Roundtable, The National Association of Manufacturers, and The American Petroleum Institute, at 10-11, 15-18.

A. The Government Ignores that Congress Mandated a Stringent Model Penal Code Definition of Knowledge.

The government first argues that the district court's instruction was proper because "it is impossible for a supervisor to 'act knowingly' in failing to prevent or correct a violation without being aware of that violation." Opp. 12. The argument is facially illogical; anyone—especially a senior corporate executive—can easily go consciously about his business yet fail to prevent a violation. More importantly, Congress itself rejected the government's position by imposing the Model Penal Code's most rigid definition of a "knowing" state of mind on RCRA's knowing endangerment statute, defining the requisite *mens rea* as the actual expectation of likely results of a defendant's conduct, not merely knowing the "nature" of his conduct. Pet. 20 n.19, 21-23.

Following the tiered approach of Section 2.02(2)(b) of the Model Penal Code, RCRA distinguishes what constitutes a "knowing" state of mind in relation to each separate object element of the offense. 42 U.S.C. §§ 6928(f)(1)(A)-(C). Thus, RCRA establishes on its face that a person can act "knowingly" with respect to his conduct, by having a general "aware[ness] of the nature of his conduct," § 6928(f)(1)(A), yet only act "knowingly" with respect to the *results* of his conduct if he has an actual "aware[ness] or belie[f] that his conduct is substantially certain to cause danger of death or serious bodily injury." § 6928(f)(1)(C). The district court defined "acted knowingly" under the lesser standard—effectively, consciously going about one's business. Pet. 14, 19, 22. Yet, when applying a statutory scheme derived from the Model Penal Code's definition of "knowingly" to such crimes, courts must require strict proof of a "knowing" state of mind with respect to *results* of conduct. *See, e.g.*, *State v. Lambert*, 929 P.2d 846, 849 (Mont. 1996); *People v. Curtis*, 627 P.2d 734, 736-37 (Colo. 1981). The government's

reliance on the words "acted knowingly" in the instructions at issue does not come close to requiring proof that petitioner acted with actual knowledge of the likely results of his conduct as mandated for knowing endangerment.[4]

The result of "responsible corporate officer" liability—by whatever name—is to impose felony penalties on conduct that the district court below (Pet. 12), and the government itself, describe in the language of negligence. Opp. 12 n.3 (emphasizing the court of appeals' holding that "[e]ach of the substantive offenses were foreseeable consequences of the [petitioners'] agreement to continue operating the plant"); R14-235-6 (trial judge describing petitioner's conduct as having "failed to act in an appropriate and reasonable manner when various violations were reported to him"). RCRA does not contain a provision that criminalizes negligence. The Clean Water Act ("CWA") does, but that provision was not charged in this case. Notably, another court affirming this very instruction erroneously reasoned that "[n]egligent and inept storage of hazardous wastes is one of the evils RCRA was designed to prevent, and § 6928(d) makes such egregious conduct a crime." *United States v. Dee*, 912 F.2d 741, 746 n.8, 747 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).[5]

The disregard of RCRA's heightened knowing endangerment elements in this case affords the Court the opportunity to resolve the circuit split as to whether the most serious environmental felony statutes such as RCRA and the CWA represent "public welfare statutes" that—*in the words of the district court in this case*—"are generally subject to less stringent *mens rea* requirements than more traditional criminal

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[4] Contrary to the government's argument (Opp. 11-12, 14) that the responsible corporate officer instruction was not an alternative basis for liability, the instruction facially reads as an element-based stand-alone basis for liability. Pet. 13 n.13.

[5] The government advised the trial court that the same instruction had been given in *Dee*. App. 100a.

laws." 01-1112 Pet. App. 93a n.12.[6] The Court can thereby also answer the question—expressly reserved in *Staples v. United States*, 511 U.S. 600, 618 (1994)—whether felony crimes can be characterized as public welfare offenses. *See* Brief *Amici Curiae* of The Business Roundtable, *et al.*, at 14.

B. "Knowing Failure to Detect" Is Not Deliberate Avoidance.

The government next attempts to square the lower courts' "failure to detect" standard with RCRA's actual knowledge standard, arguing that the phrase "acted knowingly in failing to . . . detect" properly instructed the jury on the elements of deliberate avoidance, and thus equated with actual knowledge. Opp. 13.[7] The very cases that the government cites, *United States v. Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976), and *United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990), make clear that the instruction given omitted the necessary elements of a deliberate avoidance instruction. Most fundamentally, it failed to require proof of "a conscious purpose to avoid learning the truth," *Jewell*, 532 F.2d at 704, or "[a] deliberate effort to avoid guilty knowledge." *Giovannetti*, 919 F.2d at 1228. As this vocabulary suggests, the *mens rea* for deliberate avoidance requires a "purposeful" or "deliberate" state of mind bent on "avoiding" confirmation of suspected incriminating facts.

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[6] The government advises the Court that petitioner contends that this argument applies to CERCLA claims as well. Opp. 11 n.2. Petitioner was not even indicted for CERCLA claims and has made no arguments regarding CERCLA in any respect at any time.

[7] The "responsible corporate officer" instruction was not proffered to the trial court as a deliberate avoidance instruction. Neither *Dotterweich* nor *Park*, nor the other decisions the government cited to support the instruction, discuss deliberate avoidance. App. 99a-100a. The court of appeals also never alluded to the concept in its opinion below.

The "responsible corporate officer" instruction did not require proof that petitioner acted purposely or deliberately to avoid obtaining knowledge. The Model Penal Code clearly differentiates between acting "purposely" and acting "knowingly." *See* Model Penal Code §§ 2.02(2)(a)-(b) (Proposed Official Draft 1962). A person "acts purposely" only when, *inter alia*, "it is his conscious object . . . to cause" a particular result. § 2.02(2)(a)(i). Deliberate avoidance thus requires proof that it was a defendant's "conscious object . . . to cause" his own ignorance. The "responsible corporate officer" instruction required no such "purposeful" state of mind for conviction and cannot now be rationalized as a deliberate avoidance instruction.

C. The Government Sponsors an Erroneous "Failure to Correct" Standard.

The government next attempts to defend the lower courts' erroneous "failure to correct" standard, arguing that it did not permit conviction for after-the-fact knowledge because "a violation can only be corrected while it is ongoing." Opp. 13. The government appears to overlook the retrospective nature of environmental "remediation," which can drag on for years after violations occur. Under the "failure to correct" standard of criminal liability adopted below, the jury could have convicted petitioner if he first became aware of the plant's alleged violations at the time of his indictment in 1998, but "failed" to "correct" them by not subsequently contributing to the site's Superfund clean-up efforts.[8] This logic cannot be squared with the statutory requirement that the defendant knowingly cause the violations.

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[8] The government also ignores that not all of the counts in the indictment allege continuous violations. For example, counts 26 through 32 allege seven specific illegal disposals of wastewater under RCRA, which petitioner allegedly caused by allowing wastewater to flow out of the plant on seven specific days at various times throughout 1993. R1-35.

D. Petitioner Was Denied His Due Process Right to a Trial Under the Proper Legal Standard.

To deflect attention from the "responsible corporate officer" instruction, the government emphasizes the Eleventh Circuit's correct recitation of RCRA's actual knowledge standard during its review of the sufficiency of the evidence, when the court necessarily evaluated the record in the light most favorable to the government. Opp. 10. This Court should find no solace in a systemic discrepancy between the law applied at trial and the law on appeal, which would deny the accused his constitutional right to have the evidence against him considered by the jury under the correct legal standard with the benefit of the reasonable-doubt standard.[9] Simply put, the appellate court's sufficiency review cannot undo the denial of petitioner's right to a fair trial any more than it will deter future prosecutors and courts from using the same instruction.

II. THE GOVERNMENT SIDESTEPS THE UNJUSTIFIED SPLIT BETWEEN CIVIL AND CRIMINAL INTRACORPORATE CONSPIRACY LAW

The government opposes petitioner's conspiracy argument without acknowledging this Court's decision that in some cases conspiracy liability will not lie for wholly intracorporate conduct, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984), or the subsequent use of the intracorporate conspiracy doctrine to preclude liability of corporate actors beyond the antitrust context, *see* Pet. 27-28. In addition, the government gives no explanation why the doctrine should be applied to shield corporate employees

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[9] Petitioner vehemently denies the government's mischaracterization of the evidence in its opposition brief, but understands that this Court is not the forum in which to resume that debate.

from liability for wholly intracorporate conspiracies to violate civil rights, but not to preclude liability for wholly intracorporate conduct implicating environmental violations, despite a nearly identical statutory context. *Compare* 42 U.S.C. § 1985 *with* 18 U.S.C. § 371 (both requiring that "two or more persons" conspire).[10]

While the government suggests otherwise, the application of the intracorporate conspiracy doctrine to corporate employees is far from uniform among circuit courts. *Compare McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1038-39 (11th Cir. 2000) (en banc) (holding doctrine inapplicable to criminal conspiracy under § 1985(2) because it involved the same criminal wrongdoing as under § 371) *with Wright v. Ill. Dep't. of Children & Family Servs.*, 40 F.3d 1492, 1507-08 (7th Cir. 1994) (applying intracorporate conspiracy doctrine to criminal conspiracy under § 1985(2)). *See also Tripp v. Executive Office of the President*, 200 F.R.D. 140, 150 (D.C. Cir. 2001) (noting disagreement among the federal circuits regarding the applicability of intracorporate conspiracy doctrine to § 1985 claims). *See generally* Shaun P. Martin, *Intracorporate Conspiracies*, 50 Stan. L. Rev. 399, 443-45 (1998).[11]

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[10] The government's argument that the text of 18 U.S.C. § 371 allows for conviction also overlooks this Court's own refusal to impose liability even when statutory language facially covers intracorporate conspiracies. *See Copperweld*, 467 U.S. at 769 (noting that the literal meaning of the Sherman Act would seemingly apply to wholly intracorporate conduct).

[11] The government's citation to this article is misleading. For example, it cites to footnote 250 as support for the suggestion that the author's criticisms apply only to entity liability, *see* Opp. 19; however, it fails to include Professor Martin's statement that many of the textual, precedential, and policy-based contentions used to critique entity liability may be used to challenge individual liability for corporate behavior, which is precisely petitioner's point.

No court, and certainly not the government in its opposition, has adequately explained why criminal liability should be imposed on corporate employees for participating in intracorporate environmental decisionmaking, while the same employees working within the scope of their employment would not be held liable if they actively conspired to violate an individual's civil rights. Similarly, the contradiction inherent in imposing imputed "supervisor liability" for the corporation's environmental crimes, while disregarding the principle of corporate unity under the intracorporate conspiracy doctrine, begs for clarification by this Court.

III. PETITIONER RAISED HIS CLAIMS BELOW

Inexplicably, the government argues that the Court should not hear some of petitioner's arguments because they were not made below. Opp. 12, 18. This Court's "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). All of petitioner's arguments were explicitly raised below or are directly in support of federal claims properly presented below, including his claim that the "responsible corporate officer" instruction eviscerated the statutory *mens rea* requirement,[12] and his claim that the evidence of his intracorporate conduct did not suffice to support his conspiracy

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[12] *See, e.g.*, Brief of Appellant Randall W. Hansen (filed October 4, 1999), at 46 (point heading: "II.B. The Trial Court Erred in Giving the Jury an Alternative Responsible Corporate Officer Instruction Which had the Effect of Removing the Scienter Requirements from the RCRA and CWA Statutes"), 52 (point heading: "II.C. The Responsible Corporate Officer Instruction Eviscerated the Heightened 'Knowing' Requirements of RCRA's Knowing Endangerment Statute and Allowed the Jury to Convict Randall Hansen Without Making the Requisite *Mens Rea* Determinations").

conviction.[13] It is hard to imagine what more petitioner could have done to preserve his arguments. Because petitioner "can make any argument in support of" his properly presented federal claims, all argument in his Petition conforms with this Court's traditional rule. *See, e.g.*, *Lebron*, 513 U.S. at 379; *Yee*, 503 U.S. at 534.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] *See* Reply Brief of Appellant Randall W. Hansen (dated January 18, 2000), at 21-22 (citing *Copperweld* and an article on intracorporate conspiracies under Section 1985 and advancing policy-based rationales for not imposing intracorporate conspiracy liability in the environmental context). The Eleventh Circuit has also repeatedly passed on the question of intracorporate liability under 18 U.S.C. § 371, as in its unanimous *en banc* decision in *McAndrew*, 206 F.3d at 1038-39, which was decided during the pendency of petitioner's appeal.